146 U.S. 33

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1158. ~~791~~ 365 42

COLIN CAMERON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED MAY 31, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JUNE 14, 1889.

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a In the Supreme Court of the Territory of Arizona.

UNITED STATES, Appellee, *vs.* COLIN CAMERON, Appellant.

Transcript on Appeal.

Demanded by Messrs. Jeffords & Franklin Nov. 12th, 1887; delivered to Messrs. Jeffords & Franklin, Dec. 1st, 1887, atty's for appellant.

Filed January 9th, 1889.

E. B. DODGE, *Clerk.*

1 In the district court of the first judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.

UNITED STATES OF AMERICA, Plaintiff,
vs.
COLIN CAMERON, Defendant.

Plaintiff states that defendant is now maintaining, and for a long time prior to this date has been maintaining, a certain wire fence, by which he has enclosed a large tract of the public lands belonging to the United States of America subject to entry at the proper land office under the laws of the United States in such cases made and provided.

That the lands enclosed by the fence aforesaid are in the first judicial district of the Territory of Arizona and in the county of Pima, but near the line between said county and the county of Cochise.

That defendant has enclosed as aforesaid about 800 acres
2 of the public lands aforesaid without any title or claim or color of title, acquired in good faith, thereto, and without having first made application to acquire title thereto, or of any part thereof, according to law.

That the lands so inclosed as aforesaid are located about three miles west of the Huachuca Mountains, and in what is known and called Turkey creek or Turkey cañon, and about three miles in a westerly direction from the ranch of V. H. Igo, and about one and one-half miles in a southwesterly direction from Clark's Camp, in Evens mining district. The land inclosed is sometimes called the "French Louie ranch."

That the lands aforesaid are subject to entry under the general laws of the United States applicable to the entry of agricultural lands, and that said lands are agricultural lands.

Wherefore plaintiff asks for a judgment against defendant that the said fence be removed from the lands aforesaid by defendant within five days after judgment, and, if not removed in that time,

that the same be destroyed at defendant's costs; and for all costs in this suit, and for all proper orders, and judgment in accordance with the provisions of law.

O. T. ROUSE,
United States Attorney, for Plaintiff.

Indorsements: Complaint. Filed Sept. 6, 1886. J. H. Martin, clerk.

Demurrer.

3 Title of court and cause.

Defendant demurs to the complaint on file herein on the ground that the same does not state facts sufficient to constitute a cause of action.

Wherefore defendant asks to be dismissed hence with costs.

JEFFORDS & FRANKLIN,
Attorneys for Def't.

Indorsed: Filed Oct. 29th, '86. J. H. Martin, clerk.

Answer.

Title of court and cause.

Now comes the defendant in the above-entitled action and, answering the plaintiff's complaint on file herein, denies that he is now maintaining, or that he for a long time prior to this date has been maintaining, or that he has ever or at all maintained, a certain wire fence, or any fence of any nature or kind whatsoever, by which he has enclosed a large tract or any of the public lands belonging to the United States of America subject to entry at the proper land office under the laws of the United States, or otherwise, in such cases made and provided, or at all.

Denies that he has enclosed, as alleged in the plaintiff's complaint or otherwise, about eight hundred acres of the public lands aforesaid, or that he has enclosed any of the public lands of the United States of America without any title or claim or color of title,
4 acquired in good faith, thereto or without first having made application to acquire the title thereto and to all thereof according to law.

Denies that the lands mentioned and described in the plaintiff's complaint or any part thereof are subject to entry under the general laws of the United States applicable to the entry of agricultural lands or otherwise, or that said lands or any part thereof are now or ever have been agricultural lands of the United States, or that said lands described in the complaint are now or ever have been public lands of the United States.

ROCHESTER FORD AND
JEFFERSON & FRANKLIN,
Attorneys for Defendant.

Indorsed: Filed April 18th, '87. J. H. Martin, clerk.

Amended Answer.

Title of court and cause.

Now comes the defendant in the above-entitled action and, by leave first had and obtained, files this amendment to his answer on file in this case.

I.

That on the 15th day of May, 1825, the Mexican Government granted to Ramon Romero and other citizens of Santa Cruz a certain tract of land known and described as the Rancho San Rafael de la Zanja, now lying and being partially in the county of Pima, Territory of Arizona, and partly in the State of Sonora, Re-
5 public of Mexico: Commencing at a point called San Rafael, the center of said grant, which said point is in the county of Pima, Territory of Arizona, running thence north two leagues to the mesa or table-land, the line terminating on the bank of an arroya which runs towards the "Penasco," at the foot of an oak tree upon which was made a cross and where a pile of stones was placed as a sign; returning to the center there was measured and run thence south two leagues, the line terminating at the north of the canada of the Potrero, at which point is found the landmark of the ejidos, or the common lands of the presidio of Santa Cruz, in said State of Sonora on the side of the south.

Returning to the centre there was run thence east two leagues to a large pile of stones on the mesa land.

Returning to the centre and running thence west two leagues to a high mountain situated in the range Sierra de la Plomosa, almost southwest of the hill called "El Coloso," the summit of which is a landmark; run thence east two leagues to the "Sierra del Cobre" (Copper Mountain), where there is a spring known as "El Carricillo."

Return to said mountain, situated southwest of the hill "El Colosa," and run west two leagues to the foot of a red mountain, which is designated as a landmark, and which said red mountain
6 stands in an open place between the "Penasco" and the "Sierra de Senoyta;" run thence south along the "Sierra Plomosa" to a point beyond the San Antonio pass to two small mountains which limit the western side of the "Ejidos" or the common lands of the said presidio of Santa Cruz, and which point is a corner monument of the Rancho San Rafael de la Zanja; run thence two leagues east to a mountain of stones on the northern boundary of the ejidos or common lands of the said presidio of Santa Cruz, which said mountain is found at the north of the canada of the Potraro, from which point, continuing the square, run east two leagues to the "Jaralito," at the corner monument of the lands of the presidio of Santa Cruz; run thence north four leagues to the spring "Carricillo," being four leagues square, more or less.

II.

The said Ramon Romero departed this life, about the year 1873, intestate, and seized at the time of his death of his said interest in said land grant.

That after the death of the said Ramon Romero Alfred Green purchased and acquired all the right, title, and interest of all and each of the heirs of the said Ramon Romero in and to the above-described Mexican land grant.

That the interest of said heirs acquired by said Green was all the interest ever held by said Ramon Romero in said land grant San Rafael de la Zanja; and the said Alfred A. Green received
7 deeds from each and all of the said heirs of the said Ramon Romero for all of their right, title, and interest in and to all of the land embraced in said grant, being all the interest in said grant ever held or owned by Ramon Romero.

That afterwards, to wit, on the fifth day of November, 1880, the said Alfred A. Green and one Rollin R. Richardson entered into a contract and agreement, in writing, wherein the said Alfred A. Green agreed to sell to said Rollin R. Richardson an undivided nine-tenths of all the said Alfred A. Green's right, title, and interest in and to said above-described Mexican land grant, San Rafael de la Zanja, and all the lands embraced in the boundaries thereof, upon certain terms and conditions and considerations therein expressed, and the said Rollin R. Richardson agreed to purchase the same upon the terms expressed in said contract, and said contract and agreement was signed and sealed by said Alfred A. Green and Rollin R. Richardson, all of which will more fully appear from reference to said contract.

And thereupon said Rollin R. Richardson entered upon said Mexican land grant, San Rafael de la Zanja, with the permission of said Alfred A. Green and under said contract, and claimed the right to the possession thereof—to the boundaries as above set forth—and so represented to this defendant.

III.

8 That afterwards, to wit, on the 9th day of May, 1883, the said Rollin R. Richardson, for a valuable consideration, in writing, under his hand and seal, — sell, assign, transfer, and set over to this defendant all of the right, title, and interest which he, the said Rollin R. Richardson, had in the contract above set forth between said Alfred A. Green and said Rollin R. Richardson, and thereupon, under said assignment of said contract so as aforesaid made by said Rollin R. Richardson to this defendant, and relying upon said representations of said Richardson, defendant entered into possession of said Mexican land grant, San Rafael de la Zanja; that the conditions and considerations of the said contract or agreement above set forth between the said Alfred A. Green and Rollin R. Richardson, the conditions and considerations of the assignment of said contract made as aforesaid by said Rollin R. Richardson to this defendant, have all and singular been performed and carried out so

far as the same are or have become due; and said Rollin R. Richardson covenanted with defendant that he, said Rollin R. Richardson, had performed all the conditions of his contract with said Green, so far as the same were due at the time of said assignment.

That said defendant is the equitable owner of the said undivided nine-tenths interest of said Mexican land grant, San Rafael de la Zanja, so as aforesaid acquired by said Alfred A. Green from the heirs of said Ramon Romero, deceased, and defendant is in the possession thereof and entitled to be in possession thereof.

IV.

That an application is now pending before the Congress of the United States for the confirmation of the said Mexican land grant, San Rafael de la Zanja.

That the same has been examined by the United States surveyor general of Arizona; that said surveyor general has reported upon said grant, and has reported that the same is a valid grant, and has recommended that the said grant be confirmed to the legal representatives of Ramon Romero and his associates to the extent of four square leagues; but defendant claims and all of the persons interested in said claims, and all of the persons interested in said grant prior to defendant's acquiring his said interest therein have always claimed, that said grant should be confirmed to the exterior boundaries thereof, as herein set forth and as described in the original expediente, by which the Mexican Government granted said Rancho San Rafael de la Zanja to said Ramon Romero and other citizens of Santa Cruz.

And the defendant further avers that he is informed and believes that the honorable surveyor general for the Territory of Arizona has withdrawn from location and entry all of the lands within the exterior boundaries of said Mexican land grant, San Rafael de la Zanja, as above described; and defendant further avers that he is informed and believes that the Secretary of the Interior of the United States has ordered the surveyor general of the Territory of Arizona to cause said Mexican land grant, the Rancho San Rafael de la Zanja, to be surveyed according to the original boundaries thereof, as claimed by defendant and always claimed by claimants of said land grant, San Rafael de la Zanja; and defendant further avers that said survey will include in its boundaries all of the land embraced in the enclosure or fence mentioned and described in the complaint.

ROCHESTER FORD AND
JEFFORDS & FRANKLIN,
For Defendant.

Indorsed: Filed April 18, '87. J. H. Martin, clerk.

(*Minute Order.*)

April 18th, 1887.

Title of court and cause.

The district attorney being present and the defendant in person and by his counsel, Messrs. Jeffords & Franklin and Rochester Ford, Esq., and this being the day set for trial, the trial began before the court sitting without a jury. Argument on the demurrer of defendant to plaintiff's complaint was heard and demurrer was sustained, and the plaintiff was granted leave to amend the complaint forthwith. The trial thereupon commenced, and the following witnesses were sworn and examined and cross-examined on the part
11 of the plaintiff, to wit, T. L. Rice, Geo. McCarty, J. M. Blair, John Hise, F. W. Smith, and R. R. Richardson, and plaintiff rested.

Colon Cameron, George J. Roskruge, and Brewster Cameron were sworn and examined and cross-examined on the part of the defendant, and the defendant offered in evidence certain documentary evidence, marked Exhibits "A" 1 & 2 and Exhibits "B" & "C," and the further trial of this cause was continued.

(*Motion for Arrest of Judgment.*)

Title of court and cause.

Now comes the defendant in the above-entitled action and moves the court in arrest of judgment in this case on the ground that the court had no jurisdiction of the subject-matter of this action, for the reason that no authority existed for the institution of this suit, because it does not appear from the complaint or anywhere else in the record of this case that an affidavit was filed with the attorney for the United States for the Territory of Arizona by any citizen of the United States to the effect that the defendant or any other person violated section 1 of the act of Congress entitled "An act to prevent unlawful occupancy of the public lands," approved Feb. 25, 1885.

ROCHESTER FORD AND
JEFFORDS & FRANKLIN,
Attorneys for Def't.

Indorsed: Filed Oct. 18th, 1887. J. H. Martin, clerk.

(*Motion for a New Trial.*)

Trial [title] of the court and cause.

12 Now comes the above-named defendant and moves the court to vacate and set aside the judgment in this action and to grant a new trial of said action for the following grounds:

1st. Because the judgment is contrary to the evidence, and the evidence is wholly insufficient to sustain the judgment.

2d. Because the said judgment is contrary to the law.

3d. Because the court erred in overruling defendant's motion to nonsuit the plaintiff on the grounds stated in said motion.

4th. Because the court erred in admitting improper evidence against the defendant's objections.

5th. Because the court erred in excluding evidence offered by the defendant which was material to the issue in said action.

6th. The court erred in overruling the defendant's motion in arrest of judgment for the reason set forth in said motion.

ROCHESTER FORD AND
JEFFORDS & FRANKLIN,
Att'ys for Def't.

Indorsed: Filed Oct. 18, 1887. J. H. Martin, clerk.

(*Minute Entry.*)

October 18th, 1887.

13 Title of court and cause.

Now come O. T. Rouse, United States district attorney for Arizona, and the defendant, by counsel, Messrs. Jeffords & Franklin and Rochester Ford Esq., and defendant moves for arrest of judgment herein. Motion was overruled, and defendant thereupon excepted and moved the court for a new trial herein. Argument was had on said motion for a new trial herein, and the court, being fully advised in the premises, doth overrule said motion and deny a new trial herein; to which ruling defendant thereupon excepted and gave notice of appeal.

(*Minute Entry.*)

October 20th, 1887.

Title of court and cause.

On motion of H. R. Jeffords, Esq., of counsel for the defendant, it is ordered that the order heretofore made and entered, overruling the motion of the defendant for a new trial, be, and the same is hereby, vacated and set aside.

(*Minute Entry.*)

October 21st, 1887.

Title of court and cause.

This day the court ordered judgment in this action in favor of plaintiff and against defendant, according to the prayer of plaintiff's

complaint, and filed its findings and decree; thereupon the
14 defendant moved the court for a new trial of this action;
and the court, having heard said motion and the argument of counsel for the respective parties, does order and adjudge that said motion be, and the same is hereby, overruled; to which ruling of the court the defendant excepted; and thereupon the defendant gave notice of appeal to the supreme court of this Territory, in open court, and tendered his bill of exceptions in this action, praying that the same be signed and allowed and made a part of the record in this case, which is accordingly done.

And it is further ordered by the court that all proceedings in this action and upon said judgment be stayed, pending said appeal, upon the defendant filing a good and sufficient bond in the sum of $1,000.00.

(*Judgment.*)

Title of cause and court.

This cause came on regularly for trial on the 18th day of April, 1887, O. T. Rouse, Esq., appearing as counsel for plaintiff and Rochester Ford and Jeffords & Franklin for the defendant. A trial by jury having been expressly waived by the respective parties, the cause was tried before the court sitting without a jury; whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and, the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon the court filed its findings of fact and con-
15 clusions of law, and orders that judgment be entered herein for the plaintiff.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that the plaintiff do have and recover judgment against the defendant; that the fence described in the complaint is upon public domain of the United States, and that defendant is unlawfully maintaining the same, and that the said fence be removed by defendant within five days from this date, and if defendant fail and refuse to remove said fence within five days from date that the same be destroyed by the United States marshal at the cost of the defendant, and that plaintiff have execution therefor, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of — dollars.

Judgment recorded October 29th, 1887.

WM. H. BARNES, *Judge, &c.*

Indorsed: Filed October 29th, 1887. J. H. Martin, clerk.

Findings of Fact by the Court and Decree.

Title of court and cause.

On the 18th day of April, A. D. 1887, this cause came on regularly for a hearing before his honor Judge Wm. H. Barnes, O. T.

Rouse, United States attorney for Arizona, appearing for
16 plaintiff and Jeffords and Franklin and Rochester Ford, Esq.,
appearing as counsel for defendant. A trial by jury was waived by the respective parties and said action was tried before the court without a jury.

After evidence, both oral and documentary, was introduced for plaintiff and defendant and arguments of counsel heard, the cause was submitted to the court for consideration and decision, and the court took the case under advisement; and now, on this 18th day of October, 1887, after due deliberation, the court finds the following facts from the evidence:

I.

That on Feb. 28th, 1880, before the commencement of this action and before the erection of the fence and inclosure of the lands mentioned in the complaint of the Government, the claimants of said lands under said grant filed, under the act of Congress of July 22, 1854, with the surveyor general of the Territory of Arizona the petition offered in evidence by the defendant; that accompanying said petition was what purported to be a certified copy of the expediente offered in evidence by defendant, from the Mexican Government, of the grant, mentioned in said petition, and that said petition asked that the said grant be recommended to Congress for confirmation for all of the lands measured and called for in said
expediente and to the exterior boundaries thereof, and that
17 the grantees of said grant and their successors in interest
have always claimed that the said grant conveyed all of the land recited as measured in said expediente to the exterior boundaries measured and described in said expediente.

II.

That the said surveyor general reported upon said alleged grant and reported the same to be a valid grant, and recommended that said grant be confirmed to the extent of four square leagues and no more, and that afterwards, and before the commencement of this action, the said surveyor general caused a preliminary survey to be made of four square leagues, and no more, of said grant; which said survey and report are in words and figures following, viz:

DEFENDANT'S EXHIBIT "B."

Petition.

Before the surveyor general of the United States for the Territory of Arizona.

In the Matter of the Petition of FRANCISCO ROMERO and others for confirmation of grant for the place called San Rafael de la Sanja (Zanja).

Now come Lindley and Corello, attorneys for Francisco Romero, Pedro Romero, Inocencio Romero, Juana de Ortega Delores de ——

and for the claimants as heirs of the parsioneros (parcioneros), and show—

I. That in the year 1822 the Spanish and Mexican Gov-
18 ernments, through their proper officers, sold for $1,297 6
6 reals and 9 granos, at public sale, to Ramon Romero and his parcioneros a tract of land on the head-waters of the Santa Cruz river, known as the San Rafael de la Zanja, containing sixteen square leagues, mostly situated in that portion of the jurisdiction of the presidio of Santa Cruz of the State of Sonora which is now included in the Territory of Arizona.

The land lies on the boundary line between Mexico and the United States, about nine-tenths in the latter and one-tenth in the former, and is more particularly described in the expediente or grant for the same, executed and delivered in 1825 to said Romero, a true copy of which is attached hereto, marked Exhibit "A," and made a part of this petition. A true translation thereof, marked Exhibit "B," is also annexed hereto and made a part of this petition.

The expediente is duly registered and recorded in Mexico, and those entitled to take and hold the land under the grant were placed in judicial possession thereof, and they and their heirs have ever since had possession thereof, even when harassed by hostile Indians.

II. The tract of land is described as follows: Commencing in the center of the tract at a place called, at the time the grant was made,
"San Rafael," running thence north two hundred cordels,
19 being two leagues, to an oak tree marked with a cross cut thereon and a stone monument at the tree; thence east two hundred cordels, being two leagues, to the N. E. corner, marked by a heap of stones; thence south four hundred cordels, being four leagues, to the southeast corner, marked also by a heap of stones; thence west four hundred cordels, being four leagues, to the S. W. corner, being on the Puerta de San Antonio, where there are two little hills; thence north four hundred cordels, being four leagues, to a point on the Plomosa Mountains; thence east two hundred cordels, being two leagues, to the place of beginning. The centres of the four exterior lines of the square are marked also by monuments of stone, placed, as were the other monuments mentioned, at the time the land was measured by the Mexican Government. The tract is also bounded on the south by the pueblo lands of Santa Cruz.

III. That the words "cuatro sitios," used in the expediente by the customs, laws, and usages of the Mexican Government at that time, mean four leagues square, as distinctly marked by the survey and monuments then made and established, as appears by said expediente, and the judicial possession, occupation, and prescription of said tract has always been coextensive with said survey, and the Mexican
Government, down to the time of the cession of Arizona to the
20 United States, has accepted and recognized the survey mentioned in the expediente as fixing the bounds of the tract granted, and has, by said survey and its uniform recognition, the expediente and the large sum of money paid for said tract, given a practical construction of said words "cuatro sitios" to be four leagues square.

IV. That all the proceedings in connection with said title, from and including the presentation of the petition to and including the final act of grant, were regular and were duly authorized by law, and the respective officers mentioned in this expediente were duly authorized to perform the functions which they respectively purport to have performed in said expediente, and all facts stated in said expediente are true.

V. That the attorneys for the petitioners have found difficulty in ascertaining the exact meaning of the word parcioneros mentioned in the grant, and in ascertaining the relation which they bore, if any, to said Romero, the grantee; that there is now no record of the names of such parcioneros, so far as the attorneys can ascertain; nevertheless there are a very large number of persons who claim to be the heirs of said parcioneros, and who claim an interest in said land as such heirs.

VII. That it is impossible, without the aid of a court of general jurisdiction or a special tribunal invested with similar powers,
21 to fully determine as to who are the present rightful owners of said land if the parcioneros, without being named in the grant, were capable of taking and holding under it.

This last question, if it must be determined in this proceeding, is respectfully left for decision by the proper departments without intervention of the attorneys, as between the heirs of Romero and the heirs of those claimed to have been parcioneros.

Most of the adverse claimants unite in this proceeding for — purpose of securing confirmation of the grant in such form as will not prejudice any of the parties in the settlement of the question of title as between themselves.

VIII. That the grantees have paid taxes to the American Government on said land whenever demanded since 1853, amounting to about $2,000.00 in all.

Wherefore petitioners demand and pray that all the title be confirmed and patented to the heirs or legal representatives of the person or persons who were entitled to take and hold under the original expediente for the use and benefit of those persons only who proved to be the true heirs of said ranch.

(Signed) LINDLEY AND CORELLA,
Attorneys for Petitioners.

OFFICE OF THE SURVEYOR GENERAL,
22 TUCSON, A. T., *April 13th*, 1887.

I hereby certify that the paper attached hereto is a correct copy of the paper it purports to be a transcript of on file in this office.

[OFFICIAL SEAL.] JOHN HISE,
U. S. Surveyor General, District of Arz.

Titulo de merced de cuatro sitios de tierra para cria de ganado mayor comprendidos en el puesto nombrado San Rafael de la Zanja, sito en jurisdiccion del Presidio de Santa Cruz espedio a favor de Don Ramon Romero y demas parcioneros vecinos del propio presidio.

Sello Segundo, 12 Reales. Tesoreria General del Estado de Occide. Anos de 1825 y 26.

Juan Miguel Riesgo, Comisario Gral. de Hacienda, credito publico y guerra del Estado Interno de Occidente:

Por cuanto el articulo 81, de la ordenanza de Intendentes de cuatro de Diciembre de 1786, confirio a estos Magistrados el conocimiento y jurisdiccion de medidas rentas y composicion de tierras de sus respectivos distritos cuyo tenor a la letra es como sigue.

Arto. 81. Tambien seran los Yntendentes jueces privativos de las dependencias y causas que ocurrieren en el distrito de sus provincias, sobre rentas, composiciones y repartimientos de tierras realangas y de senorio debiendo los poseedores y los que pretendan
23 nuevas concesiones de ellas, deducir sus derechos y formalizar sus solicitudes ante los mismos Yntendentes para que instruidos legitamamente estos negocios con un promotor de mi real Fisco que nombren, los determinen segun Dro. con dictamen de sus acesores ordinarios, y admitan las apelaciones a la Junta. Superior de Hacienda, o la den cuenta en defecto de interponer recurso los Yntendentes con los autos originales cuando los estimen en estado de despachar el titulo a fin de que vistas por ella se los devuelvan o bien para que la espidan si no se la of rece reparo, o para que antes de efectuarlo evacuaren las diligencias que hechare menos la Junta y les previniese: mediante lo cual, podran recaer sin nuevos embarazos las correspondientes confirmaciones que librara a su debido tiempo la misma Junta Superior, procediendo ella en el asunto, como tambien los Yntendentes, sus subdelegados y demas, con arreglo a lo dispuesto en la real instruccion de 15 de Octubre de 1754, en cuanto no se opongan a lo resuelto por esta, sin perder de vista las saludables disposiciones de las leyes que en ella se citan, y de la 9, titulo 12, Libro 4.

En su consecuencia y habiendo hecho formal reintegro en 19 de Julio de 1821, Don Manuel Bustillo, vecino del presidio de Santa Cruz, ante el Sr. Gobernador Yntendente que fue de Sonora y Sinaloa, Brigadier D. Antonio Cordero, de cuatro sitios de tierra para cria de ganado en el puesto nombrado de la Zanja, sitio en
24 jurisdiccion del mismo presidio, le fue admitido conforme a Dro. dando comision bastante al comandante de aquella compania capitan Don Simon Elias Gonzales, para la correspondiente mensura, cuyo escrito, proveido, y auto de obedecimiento con como siguen:

Sr. Gobernador Intendente Don Manuel Bustillo, vecino del Presidio de Santa Cruz ante la superioridad de V. S. con el respeto debido y como mas haya lugar en dro. paresco y digo: que teniendo un competente numero de ganado caballar y bacuno, necesito de terrenos para su conservacion y porcreo, para cuyo fin registro tres sitios de tierra en el mismo presidio de mi domicilio a remate y fuera de las medidas que le quieran asignar por la parte del Norte y un sitio mas para estancia en el paraje del Cajoncito por el lado del oriente por le que suplico a V. S. que para le mensura del expresado terreno se sirva mandar las ordenes de estilo a quien sea de su agrado: y Sr., que el comisionado tenga presente en su avaluo que el terreno que solicito esta lindando con el pais de los

enemigos Apaches, por la parte en que hasta el dia no han dejado de hostilizar.

Por tanto, a V. S. pido y suplico se sirva mandar hacer como pido en que recibire merced y justicia; juro no ser de malicia y lo necesario etc. Sr. Gobernador Yntendente.

MANUEL BUSTILLO.

25 Arizpe, Julio 19 de 1821. Por Presentado y admitido sin perjuicio de tercero que mejor derecho tenga.

El comandante de la compania de Santa Cruz procedera a la medida de los terrenos que el presentante registra, citando a los colindantes, y nombrara peritos valuadores que hagan su justiprecio; el cual pregonara por trienta dias solicitando postores; y practicara todas las diligencias de estilo hasta poner el expediente en esta juzgado privativo a fin de expedirle el titulo de merced correspondiente.

CORDERO.

Auto de Aceptacion.

SANTA CRUZ, 4 *de Octubre de* 1821.

Habeiendoseme presentado por Don Manuel Bustillo, de esta vecindad el presente decreto extendido.

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en 19 de Julio proximo pasado por el Sr. Gobernador Yntendente Brigadier D. Antonio Cordero, dije que aceptava como desde luego acepte la comision contenida en el indicado decreto; debia de mandar, y mande, previa citacion del intersado y colindantes, y acompanado de los oficiales necesarios que al efecto se nombran, se pase por mi el dia de manana, a dar principio a las medidas de los cuatro sitios para cria de ganado mayor en el puesto de la
26 Zanja segun corresponde. Por este auto que se hara saber a las partes interesdas, asi lo provey y mande y firme yo el comisionado Don Simon Elias Gonzales Capitan de la Compania que guarnese este puesto con testigos di asistencia a falta de escribano que no lo hay en los terminos que el derecho preciene.

SIMON ELIAS GONZALES.

De asta: RAMON ROMERO.

Seguidamente procedio el proprio comandante a la citacion de las partes y colindantes, y al nombramiento de los oficiales respectivos que le fueron D. Jose Antonio Calvo, para contador, Tomas Guano, para apuntador, y Felipe Jaramilio y Leandro Romero para medidores, quienes bajo de juramento en forma ofrecieron cumplir bien y fielmente sus encargos segun su leal saber y entender; y con previa vista y reconocimiento del terreno practico las medidas en los dias 5 y 6 del citado Octubre de 1821, en los terminos que constan de las siguientes diligencias.

Diligencias de medias.—Incontinenti, dicho dia, mes y ano, el

lismo comisionado para dar principio a la mensura de cuartro sitios para cria de ganado mayor denunciados por D. Manuel Bustillo de esta vecindad, entregue una cuerda de istle encerada y estirada a los officiales nombrados, asi como tambien una vara castellana en la cual se medieron y contraron en mi presencia, cincuenta varas usuales, y hecha esta operacion, se amarraron en ambos ex-
27 tremos una hasta y puestos en el punto sentrico que fijo el denunciante con el nombre de San Rafael, pidio que respecto a que el paraje de los Cajoncitos que solicitaba para estancia, se habia reconocido quedaba dentro de los ejinos de este presidio, se le agregase a los tres sitios que tenia solicitados en dicho terreno, y siendo justo su pedimento, se dio principio a la mensura rumbo al Norte para donde se tiraron y medieron dos cientos cordeles que remataron en una mesa a orillas de un arroyo que corre para el penasco al pie de una bellota, en la que se labro una cruz, y a mas, se puso en su tronco un gran monton de piedras en senal de mojonera; buelto al sentro se fueron mediendo para el sur otros dos cientos cordeles que remataron a la salida de la Canada del Potrero, en el mismo punto, en donde se halla la mojonera de los ejidos de este presedio (hacia) la parte del Norte; buelto al centro se medieron y contaron para el Oriente dos cientos cordeles que remataron pasada la citada Canada del Potrero, en una mesa consigua donde se puso un gran monton de piedras en senal de mojonera y bueltos al centro, se medieron rumbo al poniente, ciento treinta y tres cordeles, a causa de que los sesenta y siete restantes, para el completo de los dos cientos, no fue posible ejucatarlo por la asperaza del terreno, pero se graduo rematarian, sobre la cima de un cerro alto que se halla en la cordillera, de la Sierra de la Plomosa, casi
28 entry Sur y Poniente, del cerrito conocido por el caloso, senalandose desde luego su cima por mojonera, en cuya disposicion se suspendio esta operacion por ser ya tarde para continuar con las cuerdas el dia de manana.

Y para que conste lo pongo por diligencia que firmaron conmigo y testigos de Assa. los officiales, de los nombrados que lo saben hacer, y parte interesadas en la forma ordinaria.

SIMON ELIAS GONZALES.
ANTONIO CALVO.
MANUEL BUSTILLO.

Assa: LORENZO SORTILLON.
De Assa: RAMON ROMERO.

Continuacion de Medidas.—En el expresado puesto de San Rafael a los seis dias del citado mes y ano yo, el proprio comisionado a efecto de dar las cuerdas correspondientes al terreno el dia de ayer, acompanado de los oficiales nombrados pase al punto donde ramataron los dos cientos cordeles, rumbo al Norte, desde cuya mojonera, se graduaron rumbo al oriente por la aspereza del terreno doscientos cordeles que remataron a la punta de la sierra del Cobre un aguage.

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conocide por el Carrisillo, donde debe ponerse la mojonera esquina; asi como al pie de un cerro colorado, que se descubre en un claro que media entre el penasco y serros de Senoyta, el que debe servir de mojonera; graduados otras doscientas cuerdas por lo as-
29 pero del terreno, rumbe al Poniente que rematarón; desde cuyo punto se graduaron rumbo al sur por la Sierra de la Plomosa, cuatrocientos cordeles, hasta pasado el Puerto de San Antonio, sobre dos cerritos que hacen esquina para la parte del Poniente a los ejidos de este presedio, cuyo punto debe de servir de mojonera esquina a estos sitios; desde aqui, rumbo al oriente se medieron y contaron doscientos cordeles que remataron en la mojonero del Norte de los citados ejidos, que se hallen donde sale el valle, la canada del potrero, de donde continuando la cuadra rumbo al Oriente, se medieron otras doscientas cuerdas que finalizaron sobre el Jaralito en la mojonera esquina de los terrenos y a repetidos del presidio; de aqui para el Norte, se graduaron cuatro cientos cordeles por la desigualdad del terreno, que deben finalizar sobre el aguage del Carrisillo, con cuyas medidas quedo formado el cuadro, de los cuatro sitios registrados por Don Manuel Bustillo para cria de ganado mayor, dandose por recibido de ellos, y advertido que oportunamente debe senalar sus linderos con mojoneras de cal y canto segun esta prevenido, y lo firmo conmigo, officiales nombrados que lo saben hacer, y testigos de Assa. En la forma ordinaria.

SIMON ELIAS GONZALES.
MANUEL BUSTILLO.

De Assa: LORENZO CORTILLOM.
De Assa: RAMON ROMERO.

Yncontinenti procedio el proprio comandante al correspondiente avaluo por medio de peritos inteligentes que lo fueron Don
30 Alejo Bedoya y Tomas Gauna, quientes juramentados en forma de Dro. lo hicienon segun los conocimientos que tenian de todo el terreno, y con arreglo a las superiores disposiciones de la materia, dando el valor de secenta pesos a ceda de los tres sitios que tienen agua permanente, y el de treinta pesos al restante por ser solo susceptible del beneficio de noria. Con este justiprecio el comandante de Santa Cruz saco al pregon los referidos cuatro sitios por el termino de treinta dias consecutivos en solicitud de postores. No resulto ninguno, y en seguida recibio una informacion juridica de tres testigos que declararon tener suficientes bienes Don Manuel Bustillo para mantener poblado el terreno. En este estado remitido el expediente a la Yntedencia, la por que decreto de 11 de Deciembre de 1821 lo paso a la vista de su promotor fiscal cuya respuesta es la que sigue.

Sor. Yntendente interino—El promotor fiscal de esta Yntendencia ha visto con detenida atencion este expediente de tierras mensuradas a favor de Don Manuel Bustillo vecino del Presidio de Santa Cruz por el comisionado Don Simon Elias Gonzales, Capitan y comandante de dicho puesto, en el paraje nombrado San Rafael de la Zanja en aquella misma jurisdiccion, de la que resultaron cuatro sitios para cria de ganado mayor y caballada, los que fueron valuados

por dos peritos que al efecto se nombraron, a razon de secenta tres de ellos por tener agua corriente, y el cuatro, por caracer de
31 esta, y solo ser beneficiado por noria en treinta pesos, cuyas dos sumas hacen la de doscientos diez pesos, y habiendolos sacado al pregon treinta dias consecutivos, no resulto postor alguno que mejorase dicho avaluo. En seguida se procedio a recibir las tres informaciones de estilo, las que acreditan tener el interesado Bustillo suficientes proporciones para mantener poblado y amparado el terreno; en tal virtud, pide el que responde se sirva V. si lo tuviere a bien, mandar celebrar las tres publicas almonedas en esta capital, convocando postores y rematandose el terreno en el mayor y mas aventajado que resulte, haciendole entender debe entrar en esta tesoreria nacional, el valor total de las tierras su media annata 18 por ciento de su conduccion 2 por ciento mandado exigir punto general y los tres pesos correspondiente a los officiales de la estinguida contaduria de Estado, espedienosele la necesaria certificacion que acredite dicho entero, la que debera unirse a este expediente y darse cuenta con el a la Junta Superior de Hacienda para la resolucion que tenga a bien tomar; o no obstante de este parecer subordinado al de V. puede determinar lo que parezca mejor.

Arizpe Diciembre 20 de 1821.

FRANCISCO PEREZ.

32 Y habiendose conformado la Yntendencia con el preinserto pedimento del promotor fiscal se procedio a la celebracion de la primera almoneda el dia 8 de Enero de 1822, en la cual comparecio Don Ramon Romero por si y a nombre de los vecinos del.

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Presidio de Santa Cruz haciendo la postura de diez ps. sobre el justiprecio del terreno e immediatemente le fue mejorada por Don Manual Bustillo con cuyo motivo se fueron mejorando alternativamente la pujas uno a otra de dichos postores hasta ascender la ultima a la cantidad de un mil y doscientos pesos hecha por Don Romero.

Publicandas las dos restantes almonedas el los dias 9 y 10 del citado mes, no occurio ningun otro mejor postor quedando solemnenente remetados los expresados cuatro sitios de tierra comprendidos en el puesto de San Rafael de la Zanja a favor del mencionado Don Ramon Romero y vecinos de Santa Cruz. En acto continuo se corrio translado del expediente al primero contesto por escrito estar conforme con todo lo actuado que se le admitiese a composicion con la hacienda nacional, y que se le librase el correspondiente titulo de merced y confirmacion, en tal virtud se proveyo el auto en vista, del tenor siguiente.

33 Auto en vista.—En la ciudad de Arizpe a los 11 dias del mes de Enero de mil ochocientoa veintidos. El Sor. Yntendente interiro de esta provincia de Sonora y Sinaloa Don Ygnacio de Bustamente, habiendo visto estas diligencios de medidas, aprecio, pregones, Almonedas y remate de los cuatro sitios de tierra realanga

para cria de ganado mayor que comprende el paraje nombrado San Rafael de la Zanja, sito en jurisdiccion del presidio de Santa Cruz, rematados a favor de Don Ramon Romero y demas vecinos del mismo puesto militar, la respuesta dada por el proprio Romero en su antecedente escrito con todo lo demas que conste y ver convino, dijo: Que declarando como declara por bastantes, conformes y arregladas en todo las indicadas diligencias: y admitiendo como desde luego admite a composicion con la Hacienda Nacional por el expresado terreno a los referidos Don Ramon Romero y vecino de Santa Cruz debia mandar y mando se notifique y haga saber al primero, proceda a entrar en la caja publica de esta ciudad la cantidad de mil doscientos noventa y siete pesos seis reales cinco granos en esta forma; mil y doscientos pesos enque por esta Yntendancia se les remataron dichas tierras; sesenta pesos, seis reales cinco granos por el derecho de media anata y su diez y ocho por ciento; veinte y cuatro pesos respectivos al dos por ciento mandado exigir por punto general, y los tres pesos restantes por derechos de la contaduria estinguida del mismo ramo; y realizando que sea tal entero poniendose la corespondiente certificacion que lo acredite en este expediente se dara cuenta con el mismo a la Junta Superior de hacienda para su aprovacion, a la resolucion que convenga y por esta auto en vista asi lo determine mande y firme con testigos de asistencia a falde de ascribano.

34

IGNACIO DE BUSTAMANTE.

Assa: JOSE MA. MENDOZA.

Assa: JOAQUIN ELIAS GONZALES.

Notificada que fue esta providencia al enunciado Romero, y visto y aprobado el expediente en junta provisional de la estinguida Yntendencia de Sonora y Sinaloa, en II del referido Enero, procedio inmediatemente el interesado a verificar el entero en la caja Nacional de Arizpe, cuyos Ministros le expedierer la certificacion que a la letra se copia.

Los Ministros principales de la Tesoreria Nacional de Arizpe y su provincia. Certificamos que al folio 3 del Libro Manual del actual ano, sentamos la partida siguiente.

Medida siguiente.

MEDIDA ANNATA DE TIERRAS.

Enero II. Son cargo $ un mildoscientos noventa y siete pesos, seis reales cinco granos enterados por Don Ramon Romero por si y los demas vecinos del Presidio de Santa Cruz en esta forma; 1,200 pesos por el principal valor en que se le han rematado por esta Yntendencia cuatro sitios de tierra realenga para cria de ganado mayor que comprende el paraje nombrado San Rafael de la Zanja, sitio en jurisdiccion del nombrado presidio; 70 pesos 6 reales, 5 granos por dro, de media annata, y su 18% de conduccion a Espana, 24 pesos respectivos al dos % mandado exigir por punto general; y los tres pesos restantes por dros. de la contaduria extinguida del citado ramo segun esplica el oficio de la Yntendencia que senale el No. I—1297-6-5—Escalante—Puente—Ramon

35

Romero. Y para que conste donde convenga, damos la presente Arizpe, once de Enero de mil ochocientos veintidos-Tomas de Escalante—Miguel Ma. de la Fuente.

Agregada la preinserta certification al expendiente de la materia, queda custodiado este en la Comiseria General de mi cargo para perpetua constancia librandose el conveniente titulo a las partes por hallarse extinguida la junta Superior que fue de Hacienda de en Mejico.

Portanto, usando las facultades que—

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espresera el preinserto articulo 81 de la Ordenanza de Yntendentes y conforme a lo dispuesto por la instruccion de 15 de Octubre de 1754 en toda lo que no se oponga al actual sistema; po el presenta, a nombre de la nacion soberana de la Republica Mejicana Q. D. G., confiero merced y confirmacion de los cuatro sitios de tierra para cria de ganado mayor que comprende el
36 puesto nombrado San Rafael de la Zanja sitio en jurisdiccion del Presidio de Santa Cruz a Don Ramon, Romero y demas vecinos interesados del proprio punto militar concediendoles y adjudicandoles dicho terreno por via de venta ycon las calidades que previenen las leyes para si, sus hijos, heredores y sucesores, con todas sus entradas, salidas, usos, costumbres, servidumbres, maderas, montes, pastos, aguas, aquajes, abrevadores y demas que le correspondan: con la precisa calidad y terminante condicion, de que hayan de amparar y poblar dichas tierras sin que se verifique estar despobladas ni desemparadas por tiempo alguno, bajo el apercevimiento de que si se verificare su total abandono por espacio de un ano completo y hubiere persona que lo denunciare en tal evento con previa calificacion del heco, se ajudicaran en el mejor postor que resultare, exceptuando, como es justo, aquellos casos en que el decamparo sea por cause de las invasiones del enemigo Apache que hostiliza la frontera: previniendo igualmente a los referidos Don Romero y vecinos de Santa Cruz que habran bajo sus respectivos terminos y linderos los cuales deberan senalarse con mojoneras de cal y canto.

Y los Sres. Alcaldes y Jueces que al presente son, y en adalante fueron, del Presidio de Santa Cruz y partido de Arizpe, en obsequio de la buena administracion de justicia y en complimento de las leyes de la materia no permitiran que los mencionados interesados,
37 ni sus sucesores, sean perturbados en manera alguna en el libro uso, ajercicio, propriedad dominio y posesion dé los citados suatro sitios di tierra comprendidos en el puesto nombrado San Rafael de la Zanja antes si, celaran y cuidaran con la mayor actividad, que sean emparados y mantenidos siempre en quieta y pacifica posesion de dichas tierras. En cuyos terminos libro el presente titulo de merced y confirmacion en forma, a favor de los referidos Don Ramon Ramero y parcioneros, sus hijos, herederos y sucesores entregandoseles para su resguardo con previa toma de razon en el cuaderno que corresponde. Dado en la villa del Fuerte, a quince

de Mayo de milochocientos veinte y cincos; autorizado y firmado por mi, sellado con el sello de esta Comisaria Gral. y refrendado por el infrascrito Secretario Provisional de la misma.—Entre renglones—Tomas Gauna para apuntador.—Enmendado—esprasado—1821 provincial. Por hallarse—Todo vale.—Juan Miguel Riesgo, Jose Ma. Mendoza, Srio—Provisional.

Comisaria General del Estado de Occyd.

Queda tomado razon esta titulo en la foja 3 del cuaderno No. 2 que ecsiste en esta Comisaria Gral. R.

(The following — recorded as part of the expediente in the recorder's office at Tucson, Pima county, Arizona, on pages 69 to 81, inclusive, but was detached from the original expediente some time
38 during the years between November 25, 1865, when it was filed in the recorder's office, and 1879, when it was filed in the surveyor general's office :)

Ramon Romero por si y a nombre de los vecinos de esta precidio me ha hecho presente el perjuicio que se le sigue de estar en esta capital aguardando a que se rematen las tierras registrados por Don Manuel Bustillo y siendo atendible su solicitud lo manifesto a V. para que advierta al mismo, Bustillo concurra por si o por apoderado a presenciar dicha remate para el dis 9 del corriente, entendido que si asi no lo m executa, parara en perjuicio suyo procidiendose a las almonedas que exije el expresado remate. La cual sitacion hara V. a Don Manuel Antunez por el terreno que se le tiene mercenado y a V. reclamado el envio del expediente de la materia en obvio se los perjuicios que resulteran a la Hacienda Publica de mantener poblados los terrenos registrados sin pagar como deben los derechos, respectivos. Dios guarde, A. V. M. A.

Arizpe 4 de Enero de 1822. Ygno. de Bustamante, Sor. Subdelegado de Santa Cruz.

Con oficio de V. de 30 de Noviembre ultimo he recebido el expediente de tierras registradas por Don Manuel Bustillo de esa vecinidad comprendidas de cuatro sitios para ganado mayor en el puesto de San Rafael de la Zanja, quedando advertido que el diverso oficio de V. de 7 del corriente de que las diligencias de que corre-
39 sponde a Terrenate de la pertenencia de Don Manuel Antunez se le ha entregado a Don Ygnacio Saeuz para que lo presente en esta Yntendencia.

Dios guarde a V. M. A. Arizpe II de Diciembre 1821. Tno. de Bustamante, Sor. Subdelegado del Presidio de Santa Cruz. A los vecinos de esta presidio se les ha hecho saber que en junta de almonedas de esta capital, se han rematado los terrenos que comprende el paraja nombrado San Rafael de la Zanja registrado aquel por Don Manuel Bustillo y quedo entendido de que mientras se les expide a los primeros el titulo de merced del expresado terreno debo amparar-los en la posecion y senorio que tienen en el, sin permitir que por persona ni manera alguna sean perjudicados como previene V. en su oficio de 10 de Enero del corriente que contesto Dios guarde etc. Santa Cruz, Enero 16 de 1822. Sor. Yntendente Ynterino y juez policia D. Ygnacio de Bustamente Rematados el dia de hoy en juntas

de almoedas de capital en favor de los vecinos de ese presidio los terrenos que comprende el paraje nombrado San Rafael de la Zanja registrados por D. Manuel Bustillo de la misma vecinidad, lo pongo en noticia de V. para su conociniento y que mientras se le expide a los primeros el titulo de merced del expresado terreno los ampare en la posesion y senorio que tienen en el por la composicion y pujas a que fueron admitidos con la Hacienda Nacional del Ymperio
40 Mexicano sin permitir que por persona ni manera alguna sean perjudicados y antes si amparados como es justo y debido. Dios guarde a V. M. A. Arizpe 10 de Enero de 1822. Ygno. de Bustamante, Sor. Subdelegado del Presidio de Santa Cruz.

Escala del valor total de las tierras de San Rafael de la Zanja y Dros., causados en el expediente instruido para el remate celebrado a favor de los vecinos de Santa Cruz a saber:

Por el principal valor y dros respectivos del citado terreno rematado	1297	6	5
Por papel de partes y un escrito	1	4	0
Gratificacion al tambor y pregonero	2	0	0
Derechos de Yntendencia	20	0	0
Pagados a Bustillo	69	2	6
Por Dros. del Pomotor Fiscal	6	0	0
Importan	1396	4	11

Cuy suma antecedente se satisfizo en la forma siguiente:

Con un pagere de	1192	0	0
Con otro idem de	20	0	0
Con otro idem de	45	0	0
Con otro idem de	30	0	0
	1337	0	0
Restan	59	4	11

Arizpe, II de Enero de 1822.

BUSTAMENTE.

41 Escala de las costas causadas en la mensura, pregones y demas diligencias praticadas en el expediente de las tierras de San Rafael de la Zanja hasta su estado de remision a la Yntendancia con exclusion de los dros.

Correspondientes al agrimensor A. Saenz:

Por el escrito de denuncio	2	4
Por su providencia	3	0
Por diez pregones que para el completo de los 30 respectivos dio el Alferez D. Jose Pesqueira	20	0
Pagado al pregonero los referigos treinta pregones	7	4
Por una diligencia	1	0
Por una notificacion	1	0
Por tres declaraciones de idoneidad	6	0

Una notificacion	1	0
Por una razon		4
Por cinco pliego de papel sello 4		2½
Por el trabajo material de que se compone el expediente	4	0
Por lo pagado a los oficiales medidores, apuntadores y demas	22	4
	69	2½

Arizpe 8 de Enero de 1822. Recibi.

MANUEL BUSTILLO.

I hereby certify that the above and foregoing, from page 69 to this page, 81, inclusive, is a true copy of an instrument in writing filed for record in my office Nov. 25th, A. D. 1865, at L o'clock p. m., by Col. F. Ronstadt.

(Signed) GREGORY P. HARTE, *Recorder.*

42 DEFENDANT'S EXHIBIT "No. 2 A."

Translation.

Title of grant of four square leagues (cuatro sitios of land para cria de ganado mayor) embraced in the place named "San Rafael de la Zanja," situated in the jurisdiction of the president of Santa Cruz, issued in favor of Don Ramon Romero and other "parcioneros," citizens of the same presidio.

Juan Miguel Riesgo, comisario general *ad interim* of the treasury, public credit and war, of the State of the west.

Whereas article 81 of the ordinances of the intendentes of the 4th of December, 1786, conferred upon these officers the administration and jurisdiction of the measurements, revenues, and granting of lands in their respective districts, the tenor of which is as follows:

81. The intendentes shall also be exclusive judges of the dependencies and causes which occur in the districts of their respective provinces in relation to the sales, compositions, and distribution of realengo lands and de senorio, it being required of their possessors and of those who petition for new grants of them to set forth their rights and institute their claims before the same intendentes, so that these matters, being legally prepared in conjunction with a promotor of my royal treasury, whom they may appoint, may be decided upon, the opinion of their ordinary assessor being heard, and
43 they may admit appeals to the superior junta de haciendo, or, if the parties do not appeal, they shall communicate to it the original proceedings for its information when they shall judge these proceedings ready for the issuing of the warrant. After having been examined by the junta they shall be returned and the warrant issued, unless some difficulty occur, and this before executing it. The measures found to be neglected by the junta shall be observed.

The proper confirmations shall, in consequence, be given by the same superior junta in due time, which shall proceed in the case, as also the intendentes, their subdelegates, and others, in conformity

with the royal regulations of the 15th of October, 1754, as far as it may not be opposed to the requirements of the latter, without losing sight of the wise dispositions of the laws cited therein, and of the law 9th, title 12, Lib. 4.

And inasmuch as Don Manuel Bustillo, a citizen of the Presidio of Santa Cruz, on the 19th day of July, 1821, petitioned the governor intendente of Sonora and Sinaloa, Brigadier Don Antonio Cordero, for four square leagues of land for the raising of stock (cuatro sitios de tierra para cria de granada mayor) at the place named "de la Zanja," situated in the jurisdiction of the same presidio; which petition was admitted, according to law, and a commission issued to the commandant of the presidial company,
44 Captain Don Simon Elias Gonzales, to make the corresponding measurements; which petition, decree, and act of acceptance are as follows:

To the governor intendente:

I, Don Miguel Bustillo, a resident of the presidio of Santa Cruz, before your honor, with the proper respect and in due form of law, appear and say—

That, having a considerable amount of stock and needing a tract of land suitable for their preservation, I denounce and ask leave to purchase at auction three square leagues of land in the same presidio in which I reside and outside of the boundaries thereof on the side of the north, and one square more for an "estancia" in the place of the "cajoncita," on the side of the east.

Wherefore I pray your honor that for the measurement of the said lands you be pleased to issue the necessary orders to the proper officers, and that the commissioner, in the valuation of the said land, may take into consideration that the land asked for borders upon the country of the Apaches, who are constantly hostile.

I therefore pray your honor to be pleased to grant my petition, in which I shall receive favor and justice, swearing that I do not act in bad faith and to whatever is necessary.

Arizpe, July 19th, 1821.

MANUEL BUSTILLO.

The foregoing petition having been presented and admitted
45 without prejudice to the third parties, who may have a better right, the commandant of the company of Santa Cruz will proceed to the measurement of the lands petitioned for, summoning the adjoining land-owners and appointing expert appraisers for the valuation of the land, who shall value the same impartially and without prejudice, publication to be made for thirty days, for the purpose of soliciting bidders; and when all the necessary proceedings shall have been taken in the premises the expediente shall be transmitted to this juzgado privativo for the necessary proceedings, in order that the corresponding title may issue thereon.

Santa Cruz, October 4, 1821.

CORDERO.

Don Manuel Bustillo, of this vicinity, having presented me the foregoing decree, issued on the 19th of July ultimo by the senor governor intendente, Brigadier Don Antonio Cordero, I said that I accepted, as I at once did accept, the commission contained in the foregoing decree; whereupon I ordered that the parties interested and the neighboring land-owners be summoned, and, accompanied by the necessary officers, who are named, I appoint to-morrow as the day for the commencement of the measurements of the four square leagues in the place called "La Zanja," as before stated.

By this decree, which shall be made known to the parties interested, I, the commissioner, Don Simon Elias Gonzales, captain of the company of the presidio, thus provided, order-, and
46 signed, with the assisting witnesses, in the absence of a notary, as required by law.

SIMON ELIAS GONZALES.

Ass't: RAMON ROMERO.
Ass't: LORENZO SORTILLON.

Immediately the commandant proceeded to summon the neighboring land-owners and to appoint the respective officers, who were Don Jose Antonio Calvo, as counter; Thomas Guana, as notor; Philipe Jaramillo and Leandro Romero, as measurers, who, under oath, promised to discharge their duties faithfully to the best of their ability; and, after an examination of the land, the measurements were made on the fifth and sixth days of the month of October, 1821, in the manner as shown by the following proceedings:

On the said day, month, and year I, the said commissioner, for the purpose of commencing the measurement of the four square leagues denounced by Don Manuel Bustillo, of this vicinity, delivered a hempen cord, well twisted and stretched, to the officers appointed, and also a Castilian vara, on which cord there was measured and counted, in my presence, fifty usual varas; and, this operation being concluded, a stake was attached to each end of said cord; and being at the central point, as fixed by the denouncer, which point is named "San Rafael," the petitioner asked that since the
47 place of "Los Cajoncitos," which is petitioned for, has been recognized as being within the "egidos" (common lands) of the presidio, that it (a square league) should be added to the three square leagues for which he had petitioned, and which request appeared just; whereupon the measurement was commenced, the line being run towards the north, in which direction were measured two hundred cords, the line terminating on "a mesa" (table-land) on the bank of an arroya which runs towards the "penasco," at the foot of an oak tree, upon which was made a cross, and where a pile of stones was placed as a sign for a landmark.

Returning to the centre, there were measured two hundred cords towards the south, the line terminating at the mouth of the canada of the potrero, at the same point at which was found the landmark of the "ejidos" of this presidio on the side of the north.

Returning to the centre, there were measured and counted towards the east two hundred cords, the line terminating beyond the said

canada of the potrero, on a contiguous mesa, where a large pile of stones were placed as a sign for a landmark.

Returning to the centre, there were measured and counted towards the west one hundred and thirty-three cords, for the reason that the sixty-seven cords required to make up the two hundred cords could not be measured on account of the rough character of
48 the country; these were, therefore, estimated, the estimated line terminating on a high mountain situated in the range of the "Sierra de la Plomosa," almost southwest of the hill (cerrito) called "El Caloso," the summit of which was made a landmark; whereupon, it being now late in the day, the proceedings were suspended to be resumed on the morrow.

In witness whereof I make this entry in the proceedings, which are signed to me, the assisting witnesses, the officers appointed, who know how to write, together with the interested party, in the ordinary manner.

SIMON ELIAS GONZALES.
ANTONIO CALVO.
MANUEL BUSTILLO.

Ass't: LORENZO SORTILLON.
Ass't: RAMON ROMERO.

At the said place of San Rafael, on the sixth day of the said month and year, I, the said commissioner, together with the officers appointed, in order to locate the corresponding boundary lines of the lands measured on yesterday, went to the place at which the two hundred cords terminated on the north, from which point, on account of the roughness of the country, we estimated two hundred cords towards the east, which terminated at the point of the "Sierra del Cobre" (copper mountain) at a spring (aguaje) known as "El Carricillo," at which point a corner monument is to be placed.

In the same manner two hundred cords were estimated, on
49 account of the roughness of the country, towards the west to the foot of a red mountain, which was designated as a landmark, which mountain stands in an open place between the "penasco" and Sierra of Sogoyta. From this point four hundred cords were estimated towards the south, along the "Sierra Plomosa," to a point beyond San Antonio, where there are two small mountains which limit the western side of the "egidos" of the presidio, and which point serves as a corner monument of the tract of land which is now being measured. From this point towards the east were measured and counted two hundred cords, the line terminating at a monument on the northern boundary of the said "egidos" (of the presidio), which is found at the mouth of the canada of potrero; from which point, continuing the square towards the east, there were measured two hundred cords, the line terminating on the "jaralito" at the corner monument of the land of the presidio, already referred to.

From this point four hundred cords were estimated towards the north, on account of the roughness of the country, to the "aguaje" (spring) of the Carricillo, by which measurements was formed the

square of the four square leagues denounced by Don Manuel Bustillo for the raising of stock, and as such he accepted the same, he being informed that in due time he was to mark the boundaries by establishing the necessary monuments of lime and rough
50 stone, as required by law, signing with me, the officers appointed, who knew how to write, and the assisting witnesses, in the ordinary form.

SIMON ELIAS GONZALES.
MANUEL BUSTILLO.

Ass't: LORENZO SORTILLON.
Ass't: RAMON ROMERO.

Whereupon the commandant proceeded to the corresponding valuation of the lands by means of intelligent experts, who were Don Aleja Bedoya and Tomas Guana, who, under the oath which they made, in due form of law, from the knowledge which they had of the land and in accordance with the laws in relation to the matter, valued the three square leagues at sixty dollars each, for the reason they contained permanent water, and the remaining (square league) at thirty dollars, for the reason that it contains no water except what is furnished by wells.

Under this valuation the commandant of Santa Cruz offered the four square leagues for sale at public auction for thirty consecutive days, soliciting bidders; but no bidders appeared. Whereupon the commandant received the sworn testimony of three witnesses, who declared that Don Manuel Bustillo possessed sufficient means to stock the tract of land referred to.

In this condition the expediente was transmitted to the intendente, who, by the decree of the 11th of December, 1821, referred the same to the attorney general, promotor fiscal, whose report thereon is as follows:

To the senior intendente:

51 The attorney general, promotor fiscal, of this intendencia, has carefully examined the expediente of lands measured in favor of Don Manuel Bustillo, a resident of the presidio of Santa Cruz, by the commissioner, Don Simon Elias Gonzales, captain and commandant of said presidio, in the place named "San Rafael de la Zanja," in the jurisdiction of said presidio, from which measurements there resulted four square leagues (cuatro sitios para cria de ganado mayor y cabellas), which were valued by two experts appointed for that purpose at $60 a square league for three of the square leagues, for the reason that they contain running water; the fourth being valued at only $30, since it contains no running water and none save what is furnished by wells; which two sums make $210, and which tract of land was offered for sale at public auction for thirty consecutive days without any one appearing to offer more than the appraised value of said land. Whereupon the testimony of three witnesses was taken, which showed that the petitioner, Bustillo, possessed means sufficient to stock said tract of land. The

attorney general, promotor fiscal, therefore asks you to cause the three offers of said sale to be made at public auction in this capital, inviting bidders and selling the land at the highest possible price; the purchaser to be notified that he is to pay into the national
52 treasury the total value of the land, the media annata impost, 18 per cent. express charges, 2 per cent. general impost, and the 3 dollars for the officers of the abolished contadina.

The necessary certificate showing that these payments have been made to be issued and attached to the expediente advising the superior junta of the same, that it may take such steps as may be deemed proper.

This is my opinion, subject, however, to your determination.

Arizpe, December 20, 1821.

FRANCISCO PEREZ.

The government having approved the foregoing report of the attorney general, promotor fiscal, the first offer of sale at auction was made on the 8th of January, 1822, on which occasion Don Ramon Romero appeared for himself and in the name of the residents of the presidio of Santa Cruz and bid ten dollars above the appraised value, whereupon Don Manuel Bustillo immediately outbid the same. After this they went on bidding against each other alternately until the price was run up to $1,200.00, this being the bid made by Don Ramon Romero. The two remaining offers of sale were made on the 9th and 10th of the said month, and no higher bids being made the said four square leagues embraced in the place of "San Rafael de la Zanja" remained solemnly sold to the said Don Ramon Romero and citizens of Santa Cruz; whereupon the expediente was transmitted to the said Romero, who replied in writing that he
53 was satisfied with all that had been done, and that he would pay into the national treasury the sum required and receive the corresponding title; whereupon the following decree was made:

In the city of Arizpe, on the 11th day of the month of January, 1822, the senor intendente *ad interim* of this province of Sonora and Sinaloa, Don Ignacio de Bustamente, having examined the foregoing proceedings of measurement, appraisement, and sale of the four square leagues of royal lands, for the raising of cattle, comprehended in the place called San Rafael de la Zanja, in the jurisdiction of the presidio of Santa Cruz, and sold to Don Ramon Romero and other citizens of that military post, in view also of Romero's written answer and all other matters necessary to be considered, he declared that said proceedings were in all respects regular and sufficient; and, considering that the said Don Ramon Romero and citizens of Santa Cruz are debtors to the Government, he had notified him (the said Romero) to pay into the public treasury the sum of $1,297 6 reals and five grains in the following manner: $1,200, the amount for which the government sold said land, $70 6 reals and 5 grains as media annata impost, beside its 18 per cent.; $24 as a 2 per cent. general impost, and $3 as an impost of the abolished treasury. As soon as these payments shall be made, and the corresponding certificate thereof attached to this expediente, the same

shall be forwarded to the superior junta de hacienda for its approval or such action thereon as may be deemed proper.

54 Thus ordered, decreed, and signed with the assisting witnesses in the absence of a notary.

IGNACIO DE BUSTAMENTE.

Ass't: JOSE MARIA MENDOZA.
Ass't: JOAQUIN ELIAS GONZALES.

As soon as said Romero was notified of the foregoing proceedings, and in view of the approval thereof by the provincial junta of the extinguished intendencia of Sonora and Sinaloa, the interested party made the required payment into the national treasury of Arizpe; whereupon the minister issued the following certificate:

The principal ministers of the national treasury of Arizpe and its province certify that on folio 3rd of the Manual Book of the present year the following entry is found: January 11th, Don Ramon Romero, acting for himself and the other citizens of the presidio of Santa Cruz, has paid $1,297 6 rs. 5 grs. in the following manner: $1,200 as the price for which the government has sold him the four square leagues of royal land for cattle-raising, comprehended in the place called "San Rafael de la Zanja," in the jurisdiction of the above-mentioned presidio; $70 6 rs. 5 grs. as media annata impost and its 18 per cent. express charges to Spain; $24 as the 2 per cent. of general impost, and the remaining $3 as a tax of the abolished contadina, as is explained by the official note marked No. 1. $1,297.6.5.

55 ESCALANTE.
FUENTE.
RAMON ROMERO.

In witness whereof we give this certificate.
Arizpe, January 11, 1822.

TOMAS DE ESCALANTE.
MIGUEL MARIA DE LA FUENTE.

The above certificate having been added to the expediente the same remains on file in the office of the commissary under my charge as a perpetual testimony, the proper title being issued to the parties interested, the superior junta de hacienda of Mexico having been abolished.

Wherefore, in exercise of the faculties expressed in the foregoing inserted article 81 of the Ordinances of Intendentes, and as required by the instructions of the 15th of October, 1754, in so far as they are not opposed to the present system, by these presents and in the name of the sovereign nation of the Mexican Republic (which may God preserve), I grant the four square leagues for the raising of cattle (cuatro sitios de tierra cria para de granada mayor), comprised in the place called "San Rafael de la Zanja," situated in the jurisdiction of the presidio of Santa Cruz, to Don Ramon Romero and other citizens interested, of the same military post; granting and adjudicating to them the said lands, as a sale and under the condi-

tions prescribed by the laws, for themselves, their children, heirs, and successors, together with all its rights, uses, customs, servitudes, timbers, woods, pastures, waters, springs, watering places,
56 and other things thereunto belonging, on the positive and understood condition that they are to settle and occupy said lands, without permitting them to be unoccupied for any length of time, with the express understanding that if said lands remain unoccupied during one entire year and should be denounced by any other person they shall, after due examination of the matter, be granted to the highest bidder, excepting, of course, as is but just, those cases in which the abandonments are caused by the invasion of the hostile Apaches.

Don Ramon Romero and the citizens of Santa Cruz are also required to confine themselves within their respective limits, which are to be designated by monuments of stone and lime.

And, as required in the good administration of justice and in the fulfillment of the laws, the present and future alcaldes and judges of the presidio of Santa Cruz and district of Arizpe shall not allow the said interested parties nor their successors to be in any manner molested in the free enjoyment of the property, dominion, and possession of the above-mentioned four square leagues of land comprised int he place called "San Rafael de la Zanja;" but, on the contrary, they shall zealously and actively guard them in the quiet and peaceable possession of said lands. With this understanding,
57 I issue this grant in favor of the said Don Roman Romero and co-owners (parcioneros), their children, heirs, and successors, delivering it to them for their security, after the same shall have been duly registered in the proper book.

Issued in the city of Fuerte on the 15th of May, 1825.

Authorized and signed by me, sealed with the seal of this office, and legalized by the undersigned provisional secretary of the same.

JUAN MIGUEL RIESGO.

JOSE MARIA MONDOZO,
Provisional Secretary.

This title is registered on folio 3rd of Book No. 2 in this general office.

Findings Continued.

III.

That the said fence so maintained by the defendant is within the exterior boundaries, as said boundaries are recited as measured in said expediente, and as claimed in the petition filed before the surveyor general; that the said fence is a mile and a quarter south of the northern boundary and four miles west of the eastern boundary of land recited as measured in said expediente and as claimed in the said petition, but that it is outside of the four square leagues so as aforesaid caused to be measured by the said surveyor general, and that it is outside of the four square leagues cornering on
58 the place called la Zanja, the starting point of measurements recited in said expediente.

IV.

That Colin Cameron, the defendant, had succeeded, before the commencement of this action or the erection of said fence, to all the right, title, and interest which Ramon Romero ever had in or to said grant, and before and at the commencement of this action was, and ever since has been, in possession of all buildings on the said four square leagues so as aforesaid caused to be surveyed by said surveyor general, and is now claiming and has always claimed the title to the possession of all the land embraced within the exterior boundaries as measured in said expediente, and that he has occupied and used all of said land within said exterior boundaries by grazing of cattle upon said lands, claiming title to said land, and that he now has all of the right, title, and interest which Ramon Romero ever had or held in or to said alleged grant.

V.

That the report of the said surveyor general upon said grant has never been finally acted upon by Congress, and that said claim and said report are still pending before Congress.

VI.

That said lands are in the territory acquired by the United States from the Republic of Mexico under the Gadsden purchase.

59 VII.

That the petition filed before the surveyor general, the expediente in the Spanish language accompanying same, and the translation thereof are in words and figures as hereinbefore set forth.

Conclusion of Law.

And as the conclusion of law from the foregoing facts the court adjudges and decrees that the place where the inclosure was made was public lands, and that the inclosure was therefore unlawful, and that the court further adjudges and decrees that the said fence be removed by the defendant within five days from this date—22nd day of October, 1887—and that if the defendant fails to remove said fence within said time the same be removed by the marshal of this Territory at the cost of said defendant.

WM. H. BARNES, *Judge.*

60 In the District Court of the First Judicial District of the Territory of Arizona in and for the County of Pima.

UNITED STATES OF AMERICA *against* COLIN CAMERON. } Action for Fencing Public Lands.

Be it remembered that this cause came on for trial in the district court of the first judicial district of the Territory of Arizona in and

for the county of Pima on Monday, the eighteenth day of April, A. D. 1887, at ten o'clock a. m., before the court, a trial by jury having been expressly waived by the parties, and thereupon the following proceedings were had.

And came the plaintiff, by Owen T. Rouse, attorney for the United States for the Territory of Arizona; came also the defendant in his own proper person and by his attorneys, Rochester Ford and Messrs. Jeffords & Franklin.

T. L. RICE, a witness called upon and sworn on behalf of the plaintiff, testified as follows:

My name is T. L. Rice. I reside at the west end of the Huachua Mountains, Pima county, about seven miles from Elgin
61 station south, and about one mile from the fence which is described in the complaint in this action, and which was erected and was maintained by the defendant. I own lands in the vicinity of the fence.

(Counsel for defendant then objects to all of the above testimony on the ground that the same was immaterial, incompetent, and irrelevant, and not applicable to any issue in this case. The court overruled the objection; to which ruling of the court counsel for defendant then and there instantly excepted).

I live about one mile northwest of the fence. The fence is about one mile and a half or three quarters long, and perhaps a mile wide. There is a house inside of it; there is but one, I think, and a man named Blair, I think, lives in the house—no, there are two houses inside the inclosure. One is occupied by George McCarthy and the other is Blair. The land enclosed is cieñega, just marsh or swamp lands; a portion of it is valley or hill ranch. It is not mineral lands, as I know of. There is no mining going on within the enclosure, that I know of. Mr. Blair and McCarthy are not doing much of anything at present. They are fencing some of the land. They are the only parties living inside the enclosure; they put it up some places. There is no stock running in that enclosure,
62 except only what is turned in—maybe a few head of cattle and a few saddle-horses; the cattle, I suppose, are Mr. Cameron's.

Counsel for defendant admits that there was [were] from 640 to 800 acres of land within the fence described in the complaint, and that the said fence was erected and maintained by the defendant; but denied that the lands so enclosed were public lands.

GEORGE MCCARTY, a witness called and sworn on behalf of the plaintiff, testified as follows:

I live in Pima county, about seven miles from Elgin station, west of the Huachuca Mountains. I know of a wire fence in that vicinity and where it is erected. It was erected by Mr. Colin Campbell. A part of the land enclosed is cienega land. There is some stock running inside of the fence, which belongs to Mr. Cameron—horse

stock. The fence is a four-wire fence. There is one little house within the enclosure, and a spring-house. Nobody lives in the spring-house. I live inside the enclosure myself. My house is on the inside. I have been there a year—over a year; a year the second of February, I think. I have been farming part of it, and ploughing and planting it. I have planted corn and potatoes. I do not know whether there is any mineral in the land within the enclosure or not. Part of it is land with timber on it—oak
63 timber—and black oak and evergreen oak. On the cieñega part of it there is some tule and sacatone grass. I do not know whether any of the grass growing there is called gramma grass or not. Gramma does not grow on the cieñega, but only on the hills.

(Counsel for the defendant objected to all of the above testimony on the ground that it is immaterial, incompetent, and irrelevant and does not raise any question between the Government and the defendant as to whether the land fenced was public land or not.)

The court overruled the objection; to which ruling of the court defendant, by his counsel, then and there instantly excepted.

The question was then asked the witness what right of any kind he had there within this enclosure; which question was objected to by counsel for defendant on the ground that the question was immaterial, irrelevant, and incompetent, and that the inquiry into the witness' right could not show or tend to show that the defendant had fenced the land in controversy without any color of title or claim of right made in good faith, or that the land was public land of the United States.

The court overruled the objection; to which ruling of the court counsel for the defendant then — there instantly excepted.

I am farming within the enclosure; not working for Mr. Cameron, but for myself. There was a fence at the time I went
64 there, and I went through the fence and located there inside the enclosure without the consent of the Camerons, the defendant, or anybody else. I did not have a contract or agreement with anybody in regard to the land. I could not find anybody that owned it but the Government. Anyway, I went in there and went to farming.

A. M. BLAIR, a witness called and sworn on behalf of the plaintiff, testified as follows:

I reside in Pima county, about eight or nine miles from Elgin station. I know a certain wire fence erected by Mr. Colin Cameron containing in the neighborhood of 800 acres of land. The land fenced is agricultural land. I do not know when the fence was erected. I never saw the land before the fence was there. Myself and Mr. McCarty reside on the land within that enclosure. I have located 160 acres for farming.

(All of the above testimony of this witness was objected to by counsel for the defendant on the ground that the same was irrelevant,

immaterial, and entirely outside of any issue in the case and did not show or tend to show whether or not the lands enclosed were public lands, or any part thereof were [was] fenced by Mr. Cameron without any color of title or claim of right, made in good faith.)

JOHN HISE, a witness called and sworn on behalf of the plaintiff, testified as follows:

65 My name is John Hise. I am surveyor general of this Territory, and cannot state what lands have been surveyed in the vicinity of the west side of the Huachuca Mountains, in Pima county, south of Elgin station, because I don't know where Elgin station is, or the Huachuca Mountains. I have never been there and am not familiar with them. If you will name the meridian or a section I can tell you. I cannot state which is the most easterly meridian in Pima county that has been surveyed unless I refer to the map.

FRED. W. SMITH, a witness called and sworn on behalf of the plaintiff, testified as follows:

(Whereupon defendant admitted in open court that the witness was receiver of public moneys in the land office at Tucson, in the Territory of Arizona. The defendant further admitted in open court that he never claimed to own the land enclosed within the fence complained of under any law of the United States relative to the public lands of the United States, nor occupied it with a view of entering it under any law of the United States applicable to the disposal of the United States public lands.)

A. M. BLAIR, was recalled for plaintiff, and testified as follows:

I never saw the lands within that enclosure before the same were fenced.

ROLLIN R. RICHARDSON, a witness called and sworn on
66 behalf of the plaintiff, testified as follows:

My name is Rollin R. Richardson; I reside on the Pennsylvania ranch part of the time and in Tucson part of my time. I am pretty well acquainted with the country southeast of Elgin station, about seven or eight miles, and west of the Huachuca Mountains. I am acquainted with what is called French Louis' Cieñega, and have known it since some time in 1880, I believe.

The witness was then asked if the French Louis Cieñega was enclosed when he first knew it?

To which question counsel for the defendant objected on the ground that it was immaterial and irrelevant as to whether it was enclosed or not at the time when Mr. Richardson first knew it, and could not show or tend to show that the lands were public lands of the United States, or that they had been fenced by the defendant Cameron without any claim or color of title or right, asserted in good faith, to the same.

The court overruled the objection and permitted the question to

be asked; to which ruling of the court counsel for the defendant then and there instantly excepted.

And in reply to the question witness testified as follows:

I believe it was enclosed. I think there was a small enclosure of cieñega; I can't remember how much of it. It wasn't a very large field; I can't say about how many acres.

67 (Counsel for defendant objected to all this testimony on the ground stated in the first objection to Mr. Richardson's testimony. The court overruled the objection; to which ruling of the court counsel for the defendant then and there instantly excepted.)

I can't say how much fence. I just remember a fence being there. It was nearer ten or twenty acres than anything else.

The question was then asked this witness, What improvements were there, if any?

(Which question was objected to by counsel for the defendant on the ground that it was immaterial, incompetent, and wholly irrelevant to any question or issue in this case; but the objection was by the court overruled; to which ruling of the court counsel for the defendant then and there instantly excepted.)

There was a small adobe house; that's all I remember seeing in the way of improvements. I have seen that place lately; I saw it last fall some time. I didn't notice anything more in the way of enclosure or improvements than I had seen the first time I was there. I believe there was an old stable or shed of some kind in back of this house that I don't think was there the first time when I first saw it. It was the same house and the same field, that I remember. I didn't notice any new fence. The corral was fixed up a little. I didn't pay much attention to it when I was there last.

68 (On his cross-examination witness testified:)

At the time I first recollect the enclosure I think there was from ten to twenty acres of land enclosed. I do not remember that there was more than that. I think there was but one enclosure on this French Louis' place. I am not certain about it. I think the enclosure is the same now as when I first saw the place; that it is not any greater than when I originally knew the land. There was a house on the land when I first knew it. It wasn't vacant land then nor unoccupied.

(The witness was then asked the question, "I will ask you, Mr. Richardson, as to whether or not that land was within the claimed boundaries of the San Rafael ranch, as it was claimed by the claimants, when you first knew it."

The question was objected to by the counsel for the plaintiff, and the court sustained the objection; to which ruling of the court counsel for defendant then and there instantly excepted; and thereupon the following question was asked the witness by counsel for defendant:

"I will ask you if, at that time, you knew where the claimed boundaries of the ranch San Rafael de la Zanja, the Mexican land grant, were."

Which question was objected to by counsel for plaintiff, and the objection was sustained by the court; to which ruling of the court defendant, by his counsel, then and there instantly excepted.

69 The following question was then asked of this witness:

"Did this land called the French Louis ranch come within the boundaries of the San Rafael Mexican land grant?"

Which question was objected to by counsel for plaintiff, and the objection was sustained by the court; to which ruling of the court counsel for defendant then and there instantly excepted.)

I don't remember seeing a four-wire fence down there the last time I was down there. I was down there last fall, in October. I met Colin Cameron down there. There might have been a fence there, but I do not remember of seeing it. In 1880, it seems to me, there was a little enclosure there. It seems to me that I saw some new posts but no wire, and that those posts were outside of the old enclosure.

(The question was then asked this witness:

"With the exception of this little enclosure, what was the general character of the country?"

Which question was objected to by counsel for defendant on the ground that it was irrelevant and outside of the issues in this case. The objection was by the court overruled; to which ruling of the court counsel for defendant then and there instantly excepted.)

It was quite a rough country. I don't think it was occupied by anybody around the Louis place. It seemed to be open

70 country around it.

T. L. RICE, a witness previously called and sworn on behalf of the plaintiff, was recalled for further direct examination, and testified as follows:

I have known the country where this fence is about four years, and there was enclosures at the point where the fence now is.

The following question was then asked this witness:

When you first knew that country was there an enclosure at that point?

To which he answered:

"Within the boundaries of this six or eight hundred acres there was a brush fence."

The question and answer were both objected to by the defendant on the ground that they were immaterial and irrelevant and outside of any issue raised in the case.

Which objection was by the court overruled; to which ruling of the court defendant, by his counsel, then and there instantly excepted.

The following question was then asked:

"How much was enclosed within the brush fence?"

Which question was objected to by counsel for the defendant on the ground that the same was wholly incompetent and outside of any issue in this case; which objection was by the court overruled; to which ruling of the court defendant, by his counsel, then and there instantly excepted.

There was, perhaps, twenty or twenty-five acres enclosed within the brush fence. Outside of the enclosure there was an adobe
71 house; it was about two hundred yards from the brush fence, I reckon. The present enclosure takes in a great deal more than the brush fence.

The following question was then asked this witness:

"Now, independent of this fence—the present fence—what is the true character of the country as to being occupied—what are the improvements?

The question was objected to by the counsel for the defendant on the ground that the same is incompetent, immaterial, and irrelevant, and wholly outside of the issues in this case, and does not show or tend to show that the lands enclosed are or ever were public lands of the United States, or that they were enclosed by the defendant without any claim or color of title or claim asserted and made in good faith; which objection was by the court overruled; to which ruling of the court counsel for the defendant then and there instantly excepted.

Inside of this enclosure of eight hundred acres there was cabins, an old spring-house that has been on the ranch ever since I knew it, and there is Mr. McCarty's house inside the enclosure, and Mr. Blair's; that is three buildings; and inside the enclosure there is, perhaps, twenty acres of the land broke that has been broken within the last year. Outside of what I have described, a part of the ranch is hill lands—two-thirds of it, maybe—and the rest is what
72 we call a cienega land or bottom land. There is no evidence of any occupation of the land outside of McCarty and Blair.
The following question was then asked this witness: "At the time that brush fence was there and the house what other enclosures were around there, independent of that?"

Which question was objected to by counsel for the defendant on the ground that the same was immaterial, irrelevant, and incompetent, and wholly outside of any issue in this case, and that the answer could not show or tend to show that the lands fenced were now or ever were public lands of the United States, or were not claimed by the defendant in good faith and under claim and color

of title. The objection was by the court overruled; to which ruling of the court counsel for defendant then and there instantly excepted.

The land has been occupied ever since I have been in the country—all of it; I mean that which was inclosed in the brush fence; that that was not inclosed by the brush fence was not occupied by anyone that I know of, and never has been, so far as I know, till recently.

This was all the testimony introduced by plaintiff, and plaintiff rested its case.

Whereupon the counsel for the defendant made the following motion for a nonsuit:

"We move for a nonsuit against the plaintiff in this action for the following reasons: First, that it has not been shown,
73 nor is there any proof here before the court tending to show, that the lands inclosed were public lands of the United States; second, that it has not been shown, nor is there any proof here tending to show, that the defendant in this action inclosed the lands within this fence or maintained the fence admitted to be on the lands without any claim or color of title or right made or acquired in good faith."

Which motion was by the court overruled, and the defendant, by his counsel, then and there instantly excepted to the ruling of the court.

COLIN CAMERON, the defendant, being called and sworn in his own behalf, testified as follows:

"I am the defendant in this case. I live at the San Rafael ranch, in the southern part of Pima county, about twenty miles or something like that—the ranch house—from Crittenden station. I have been in this Territory since the beginning of 1883.

The following question was then asked the witness:

"Did you make a purchase or contract for purchase of the ground known as the San Rafael de la Zanja private land claim; and, if so, with whom?"

I did; with Mr. R. R. Richardson. After making this contract with Mr. R. R. Richardson—before ever entering into the
74 contract—I looked into the validity of this property—that is, first, I went out with Mr. Richardson, and he showed me the lands—showed me the monuments, some of them—and then I returned to Tucson with him and went into the surveyor general's office and looked up the papers there and got an opinion of Mr. Hopkins, who was at that time the clerk in the employ of the Government—— (Interrupted.)

Counsel for plaintiff objects to any evidence as to the defendant having gotten any information of Mr. Hopkins; which objection was by the court sustained; to which ruling of the court counsel for defendant then and there instantly excepted.

Counsel for defendant offered in evidence a transcript of the ex-

pediente from the Mexican Government, dated May 15th, 1825, by which the Rancho San Rafael de la Zanja was granted to Ramon Romero and other persons of Santa Cruz, duly certified by the former surveyor general of the Territory of Arizona to be a true and correct copy of the papers in the matter then on file in his office.

Counsel for plaintiff objected to the admission of the same in evidence as being irrelevant and incompetent.

A certified copy of which original expediente appears in the findings of fact in this cause.

A true translation of which expediente is in the words and figures following, to wit:

"Title of grant to four square leagues (cuatro sitios of land para cria de ganado mayor) embraced in the place named San
75 Rafael de la Zanja, situated in the jurisdiction of the presidio of Santa Cruz, issued in favor of Don Ramon Romero and other "parcioneros," citizens of the same presidio, Juan Miguel Riesgo, comisario general *ad interim* of the treasury, public credit and war of the State of the west. Whereas article 81 of the Ordinances of Intendentes of the 4th of December, 1786, conferred upon these officers the administration and jurisdiction of the measurements, revenues, and granting of lands in their respective districts, the tenor of which is as follows:

81. The intendentes shall also be the exclusive judges of the dependencies and causes which occur in the districts of their respective provinces in relation to the sales, compositions, and distributions of realengo lands and de senorio; it being required of their possessors and of those who petition for new grants of them to set forth their rights and institute their claims before the same intendentes; so that these matters, being legally prepared in conjunction with a promotor of my royal treasury, whom they may appoint, may be decided upon, the opinion of their ordinary assessor being heard, and they may admit appeals to the superior junta de haciendo; or, if the parties interested do not appeal, they shall communicate to it the original proceedings for its information when they shall judge these
76 proceedings ready for the issuing of the warrant. After having been examined by the junta they shall be returned and the warrant issued, unless some difficulty occur, and this before executing it, the measures found to be neglected by the junta shall be observed. The proper confirmations shall, in consequence, be given by the same superior junta in due time, which shall proceed in the case, as also the intendentes, their sub-delegates, and others, in conformity with the royal regulation of the 15th of October, 1754, as far as it may not be opposed to the requirements of the latter, without losing sight of the wise dispositions of the laws cited therein, and of the law 9th, title 12, Lib. 4.

And inasmuch as Don Manuel Bustillo, a citizen of the presidio of Santa Cruz, on the 19th day of July, 1821, petitioned the governor intendente of Sonora and Sinaloa, Brigadier Don Antonio Cordero, for four square leagues of land for the raising of stock (cuatro

sitios de tierra para cria de granada mayor) at the place named "de la Zanja," situated in the jurisdiction of the same presidio; which petition was admitted according to law, and a commission issued to the commandant of the presidial company, Captain Don Simon Elias Gonzales, to make the corresponding measurement; which petition, decree, and act of acceptance are as follows:

To the governor intendente:

I, Don Manuel Bustillo, a resident of the presidio of
77 Santa Cruz, before your honor, with the proper respect and in due form of law, appear and say that, having a considerable amount of stock and needing a tract of land suitable for their preservation, I denounce and ask leave to purchase at auction three square leagues of land in the same presidio in which I reside and outside of the boundaries thereof, on the side of the north, and one square league more for an "estancia" in the place of the "cajoncita," on the side of the east. Wherefore I pray your honor that for the measurement of the said lands you be pleased to issue the necessary order to the proper officers, and that the commissioner, in the valuation of the said land, may take into consideration that the land asked for borders upon the country of the Apaches, who are constantly hostile.

I therefore pray your honor to be pleased to grant my petition, in which I shall receive favor and justice, swearing that I do not act in bad faith, and to whatever is necessary.

MANUEL BUSTILLO.

Arizpe, July 19th, 1821.

The foregoing petition having been presented and admitted without prejudice to third parties, who may have a better right, the commandant of the company of Santa Cruz will proceed to the measurement of the lands petitioned for, summoning the adjoining land-owners and appointing expert appraisers for the valuation of the
78 land, who shall value the same impartially and without prejudice, publication to be made for thirty days for the purpose of soliciting bidders; and, when all the necessary proceedings shall have been taken in the premises, the expediente shall be transmitted to this "juzgado privativo" for the necessary proceedings in order that the corresponding title may issue thereon.

CORDERO.

SANTA CRUZ, *October* 4, 1821.

Don Manuel Bustillo, of this vicinity, having presented me the foregoing decree, issued on the 19th day of July ultimo by the senor governor intendente, Brigadier Don Antonio Cordero, I said that I accepted, as I at once did accept, the commission contained in the foregoing decree; whereupon I ordered that the parties interested and the neighboring land-owners be summoned, and accompanied by the necessary officers, who are named, I appoint to-morrow as the day for the commencement of the measurements of the four square leagues in the place called "La Zanja," as before stated.

By this decree, which shall be made known to the parties interested, I, the commissioner, Don Simon Elias Gonzales, captain of the company of the presidio, thus provided, ordered, and signed, with the assisting witnesses, in the absence of a notary, as required by law.

SIMON ELIAS GONZALES.

Ass't: LORENZO SORTILLON.
Ass't: RAMON ROMERO.

79 Immediately the commandant proceeded to summon the neighboring land-owners and to appoint the respective officers, who were Don Jose Antonio Calvo, as counter; Tomas Guana, as notor; Philipe Jaramillo and Leandro Romero, as measurers, who, under oath, promised to discharge their duties faithfully, to the best of their ability; and, after an examination of the land, the measurements were made on the fifth and sixth days of the month of October, 1821, in the manner as shown by the following proceedings:

On the said day, month, and year I, the said commissioner, for the purpose of commencing the measurement of the four square leagues denounced by Don Manuel Bustillo, of this vicinity, delivered a hempen cord, well twisted and stretched, to the officers appointed, and also a Castilian vara, on which cord *where* were measured and counted in my presence fifty usual varas; and, this operation being concluded, a stake was attached to each end of said cord; and, being at the central point, as fixed by the denouncer, which point is named "San Rafael," the petitioner asked that since the place of "Los Cajoncitos," which is petitioned for, has been recognized as being within the "egidos" (common lands) of the presidio, that it (a square league) should be added to the three square leagues for which he had petitioned, and which request appeared just; whereupon the measurement was commenced, the
80 line being run towards the north, in which direction were measured two hundred cords, the line terminating on a "mesa" (table-land) on the bank of an arroya which runs towards the "penasco," at the foot of an oak tree, upon which was made a cross, and where a pile of stones was placed as a sign for a landmark. Returning to the centre, there was measured two hundred cords towards the south, the line terminating at the mouth of the canada of the potrero, at the same point at which is found the landmark of the "egidos" of this presidio, on the side of the north. Returning to the centre, there were measured and counted towards the east two hundred cords, the line terminating beyond the said canada of the potrero on a contiguous mesa, where a large pile of stone was placed as a sign for a landmark.

Returning to the centre, there were measured and counted towards the west one hundred and thirty-three cords, for the reason that the sixty-seven cords required to make up the two hundred cords could not be measured on account of the rough character of the country. These were, therefore, estimated, the estimated line terminating on a high mountain situated in the range of the "Sierra de la Plomosa,"

almost southwest of the hill (cerito) called "El Coloso," the summit of which was made a landmark.

Whereupon, it being now late in the day, the proceedings were suspended, to be resumed on the morrow.

81 In witness whereof I make this entry in the proceedings, which are signed by me, the assisting witnesses, the officers appointed, who knew how to write, together with the interested party, in the ordinary manner. SIMON ELIAS GONZALES.
ANTONIO CALVO.
MANUEL BUSTILLO.

Ass't: LORENZO SORTILLON.
Ass't: RAMON ROMERO.

At the said place of San Rafael, on the sixth day of the said month and year, I, the said commissioner, together with the officers appointed, in order to locate the corresponding boundary lines of the lands measured on yesterday, went to the place at which the two hundred cords terminated on the north, from which point, on account of the roughness of the country, we estimated two hundred cords towards the east, which terminated at the point of the Sierra del Cobre (copper mountain) at a spring (aguaje) known as "El Carricillo," at which point a corner monument is to be placed. In the same manner two hundred cords were estimated, on account of the roughness of the country, towards the west to the foot of a red mountain, which was designated as a landmark, which mountain stands in an open place between the "penasco" and Sierra of Sonoyta. From this point four hundred cords were estimated towards the south, along the "Sierra Plomosa," to a point beyond San Antonio, where there are two small mountains which limit the western side of the "egidos" of the presidio,

82 and which point serves as a corner monument of the tract of land which is now being measured. From this point towards the east were measured and counted two hundred cords, the line terminating at a monument on the northern boundary of the said "egidos" (of the presidio), which is found at the mouth of the canada of the protrero; from which point, continuing the square towards the east, there were measured two hundred cords, the line terminating on the "Jarilito" at the corner monument of the lands of the presidio already referred to. From this point four hundred cords were estimated towards the north, on account of the roughness of the country, to the "aguaje" (spring) of the Carricillo, by which measurements was formed the square of the four square leagues denounced by Don Manuel Bustillo for the raising of stock, and as such he accepted the same, he being informed that in due time he was to mark the boundaries by establishing the necessary monuments of lime and rough stone, as required by law, signing with me the officers appointed, who knew how to write, and the assisting witnesses, in the ordinary form.

SIMON ELIAS GONZALES.
MANUEL BUSTILLO.

Ass't: LORENZO SORTILLON.
Ass't: RAMON ROMERO.

Whereupon the commandant proceeded to the corresponding valuation of the lands by means of intelligent experts, who were Don Aleja Bedoya and Tomas Guana, who, under the oath, which they made in due form of law, from the knowledge which they
83 had of the land and in accordance with the laws in relation to the matter, valued the three square leagues at sixty dollars each, for the reason that they contained permanent water, and the remaining (square league) at thirty dollars, for the reason that it contains no water except what is furnished by wells.

Under this valuation the commandant of Santa Cruz offered the four square leagues for sale at public auction for thirty consecutive days, soliciting bidders, but no bidders appeared; whereupon the commandant received the sworn testimony of three witnesses, who declared that Don Manuel Bustillo possessed sufficient means to stock the tract of land referred to. In this condition the expediente was transmitted to the intendente, who, by the decree of the 11th of December, 1821, referred the same to the attorney general, promotor fiscal, whose report thereon is as follows:

To the senor intendente:

The attorney general, promotor fiscal, of this intendencia, has carefully examined the expediente of the lands measured in favor of Don Manuel Bustillo, a resident of the presidio of Santa Cruz, by the commissioner, Don Simon Elias Gonzales, captain and commandant of said presidio, in the place named "San Rafael de la Zanja," in the jurisdiction of said presidio, from which measurements there resulted four square leagues (cuatro sitios para cria de ganado mayor y ca-
ballas), which were valued, by two experts appointed for that
84 purpose, at $60.00 a square league for three of the square leagues, for the reason that they contain running water; the fourth being valued at only $30, since it contains no running water and none save what is furnished by wells, which two sums make $210, and which tract of land was offered for sale at public auction for thirty consecutive days without any one appearing to offer more than the appraised value of said land; whereupon the testimony of three witnesses was taken, which showed that the petitioner, Bustillo, possessed means sufficient to stock said tract of land. The attorney general, promotor fiscal, therefore asks you to cause the three offers of sale to be made at public auction in this capital, inviting bidders and selling the land at the highest possible price, the purchaser to be notified that he is to pay into the national treasury the total value of the land, the media annata impost, the 18 per cent. express charges, 2 per cent. general impost, and the three dollars for the officers of the abolished contadina; the necessary certificate showing that these payments have been made to be issued and attached to the expediente advising the superior junta of the same, that it may take such steps as may be deemed proper.

This is my opinion, subject, however, to your determination.

Arizpe, December 20, 1821.

FRANCISCO PEREZ.

The government having approved the foregoing report of
85 the attorney general, promotor fiscal, the first offer of sale at auction was made on the 8th of January, 1822, on which occasion Don Ramon Romero appeared for himself and in the name of the residents of the presidio of Santa Cruz, and bid ten dollars above the appraised value; whereupon Don Manuel Bustillo immediately outbid the same. After this they went on bidding against each other alternately until the price was run up to $1,200.00, this being the bid made by Don Ramon Romero. The two remaining public offers of sale were made on the 9th and 10th of the said month; and, no higher bids being made, the said four square leagues embraced in the place of "San Rafael de la Zanja" remained solemnly sold to the said Don Ramon Romero and citizens of Santa Cruz; whereupon the expediente was transmitted to the said Romero, who replied in writing that he was satisfied with all that had been done, and that he would pay into the national treasury the sum required, and received the corresponding title. Whereupon the following decree was made:

In the city of Arizpe, on the 11th day of the month of January, 1822, the senor intendente *ad interim* of this province of Sonora and Sinaloa, Don Ignacio de Bustamente, having examined the foregoing proceedings of measurement, appraisement, and sale of the four square leagues of royal lands for the raising of cattle comprehended in the place called "San Rafael de la Zanja," in the jurisdic-
86 tion of the presidio of Santa Cruz, and sold to Don Ramon Romero and other citizens of that military post; in view also of Romero's written answer and all other matters necessary to be considered, he declared that said proceedings were in all respects regular and sufficient; and, considering that the said Don Ramon Romero and citizens of Santa Cruz are debtors to the Government, he had notified him (the said Romero) to pay into the public treasury of this city the sum of $1,297 6 reales and 5 grains in the following manner: $1,200.00, the amount for which the Government sold said land; $70 6 reales and 5 grains as media annata impost, besides its eighteen per cent.; $24 as a 2 per cent. general impost, and $3 as an impost of the abolished treasury. As soon as these payments shall be made and the corresponding certificate thereof attached to this expediente the same shall be forwarded to the superior junta de hacienda for its approval or such action thereon as may be deemed proper.

Thus ordered, decreed, and signed with the assisting witnesses in the absence of a notary.

IGNACIO DE BUSTAMENTE.

Ass't: JOSE MARIA MENDOZA.
Ass't: JOAQUIN ELIAS GONZALES.

As soon as said Romero was notified of the foregoing proceedings, and in view of the approval thereof by the provincial junta
87 of the extinguished intendencia of Sonora and Sinaloa, the interested party made the required payment into the national

treasury of Arizpe; whereupon the minister issued the following certificate:

The principal ministers of the national treasury of Arizpe and its province certify that on folio 3rd of the Manual Book of the present year the following entry is found:

January 11th.—Don Ramon Romero, acting for himself and the other citizens of the presidio of Santa Cruz, has paid $1,297 6 rs. 5 grs. in the following manner: $1,200.00 as the price for which the government has sold him the four square leagues of royal land for cattle-raising, comprehended in the place called "San Rafael de la Zanja," in the jurisdiction of the above-mentioned presidio; $70 6 rs. 5 grs. as media annata impost and its 18 per cent. express charges to Spain; $24 as the 2 per cent. of general imposts, and the remaining $3 as a tax of the abolished contadina, as is explained by the official note marked No. 1. $1,297–6–5.

"ESCALANTE."
FUENTE.
RAMON ROMERO.

In witness whereof we give this certificate, Arizpe, January 11, 1822.

TOMAS DE ESCALANTE.
MIGUEL MARIA DE LA FUENTE.

The above certificate having been added to the expediente, the same remains on file in the office of the commissary under my charge as a perpetual testimony, the proper title being issued
88 to the parties interested, the superior junta de hacienda of Mexico having been abolished.

Wherefore, in exercise of the faculties expressed in the foregoing-inserted article 81 of the ordinances of intendentes, and as required by the instructions of the 15th of October, 1754, in so far as they are not opposed to the present system, by these presents and in the name of the sovereign nation of the Mexican Republic (which may God preserve) I grant the four square leagues for the raising of cattle (cuatro sitios de tierra para cria de ganada mayor) comprised in the place called "San Rafael de la Zanja," situated in the jurisdiction of the presidio of Santa Cruz, to Don Ramon Romero and other citizens interested, of the same military post, granting and adjudicating to them the said land as a sale and under the conditions prescribed by the laws, for themselves, their children, heirs, and successors, together with all its rights, uses, customs, servitudes, timbers, woods, pastures, waters, springs, watering places, and other things thereunto belonging, on the positive and understood condition that they are to settle and occupy said lands without permitting them to be unoccupied for any length of time, with the express understanding that if said lands remain unoccupied during one entire year and should be denounced by any other person they shall, after due expiration of the matter, be granted to the highest bidder,

excepting, of course, as is but just, those cases in which the
89 abandonments are caused by the invasion of the hostile Apaches.

Don Ramon Romero and the citizens of Santa Cruz are also required to confine themselves within their respective limits, which are to be designated by monuments of stone and lime; and, as required in the good administration of justice and in the fulfillment of the laws, the present and the future alcaldes and judges of the presidio of Santa Cruz and district of Arizpe shall not allow the said interested parties nor their successors to be in any manner molested in the free enjoyment of the property, dominion, and possession of the above-mentioned four square leagues of land comprised in the place called "San Rafael de la Zanja;" but, on the contrary, they shall zealously and actively guard them in the quiet and peaceable possession of said lands. With this understanding I issue this grant in favor of the said Don Ramon Romero and co-owners (parcioneros), their children, heirs, and successors, delivering it to them for their security after the same shall have been duly registered in the proper book.

Issued in the city of Fuerte on the 15th of May, 1825. Authorized and signed by me. Sealed with the seal of this office and legalized by the undersigned provisional secretary of the same.

JUAN MIGUEL RIESGO.

JOSE MARIA MENDOZA,
Provisional Secretary.

90 This title is registered on folio 3rd of Book No. 2, in this general office.

Counsel for the defendant further offered to prove that the land inclosed by the said fence is within the monuments, courses, and distances set forth in the expediente.

Counsel for plaintiff objected to said offer on the ground that the testimony is incompetent, immaterial, and irrelevant.

Defendant's counsel also offered in evidence, in connection with said expediente, a certified copy of the translation as it appears on file in the office of the surveyor general as the foundation of the claim in this case.

The same was objected to by counsel for plaintiff, who admitted the correctness of the translation; and counsel for plaintiff further objects to the introduction of the expediente, or the translation thereof, on the ground that this was not the proper tribunal to try a question of the kind before the court, and on the ground that the Land Department is the proper tribunal to pass upon all questions connected with Mexican or Spanish grants, and that it, the Land Department, has exclusive jurisdiction in such matters, and that therefore such testimony is immaterial, incompetent, and irrelevant; which objection was overruled, and plaintiff's counsel instantly excepted.

(The expediente and translation were admitted in evidence
91 by the court and were read.)

Defendant then introduced in evidence act of Congress of July 22, 1854, extended to the Territory of Arizona by the act of July 15th, 1870, and also offered in evidence the instructions issued from the Secretary of the Interior to the surveyor general of Arizona under and in furtherance of said statute. Defendant also offered in evidence a certified copy of a petition filed by the claimants of private land claim, Mexican grant, of San Rafael de la Zanja with the surveyor general of Arizona by the claimants of said private land claim. Same objection and ruling; to which ruling plaintiff's counsel then and there excepted.

(A copy of which instructions above referred to is attached hereto.)

And which said petition was in the words and figures following, to wit:

Petition.

"Before the Surveyor General of the United States in the Territory of Arizona.

"In the Matter of the Petition of FRANCISCO ROMERO and others for confirmation of grant for the place called San Rafael de la Zanja (Sanja).

"Now come Lindley and Corello, attorneys for Francisco
92 Romero, Pedro Romero, Inocencio Romero, Juana de Ortega, Delores des —— and for the claimants as heirs of the parsioneros (parcioneros), and show—

"I. That in the year 1822 the Spanish and Mexican Governments, through their proper officers, sold for $1,297 6 reales and 9 granos, at public sale, to Ramon Romero and his parcioneros a tract of land on the head-waters of the Santa Cruz river, known as the 'San Rafael de la Zanja,' containing sixteen square leagues, mostly situated in that portion of the jurisdiction of the presidio of Santa Cruz and of the State of Sonora which is now included in the Territory of Arizona. The land lies on the boundary line between Mexico and the United States—about nine-tenths in the latter and one-tenth in the former—and is more particularly described in the expediente or grant for the same executed and delivered in 1825 to said Romero, a true copy of which is attached hereto, marked Exhibit 'A,' and made a part of this petition. A true translation thereof, marked Exhibit 'B,' is also annexed hereto and made a part of this petition. The expediente is duly registered and recorded in Mexico, and those entitled to take — hold the land under the grant were placed in judicial possession thereof, and they and their heirs have ever since had possession thereof, even when harassed by hostile Indians.

"II. The tract of land is described as follows: Commencing in the center of the tract, at a place called at the time the grant
was made 'San Rafael,' running thence north two hundred
93 cordels, being two leagues, to an oak tree marked with a cross cut thereon and a stone monument at the tree; thence east two hundred cordels, being two leagues, to the N. E. corner, marked

by a heap of stones; thence south four hundred cordels, being four leagues, to the southeast corner, marked also by a heap of stones; thence west four hundred cordels, being four leagues, to the S. W. corner, being on the Puerta de San Antonio, where there are two little hills; thence north four hundred cordels, being four leagues, to a point on the Plomosa Mountains; thence east two hundred cordels, being two leagues, to the place of beginning. The centers of the four exterior lines of the square are marked also by monuments of stone placed, as were the other monuments mentioned, at the time the land was measured by the Mexican Government. The tract is also bounded on the south by the pueblo lands of Santa Cruz.

"III. That the words 'cuatro sitios,' used in the expediente by the customs, laws, and usages of the Mexican Government at that time, mean four leagues square, as distinctly marked by the survey and monuments then made and established, as appears by said expediente, and the judicial possession, occupation, and prescription of said tract has always been coextensive with said survey, and the Mexican Government, down to the time of the cession of Arizona to the United States, has accepted and recognized the survey men-
94 tioned in the expediente as fixing the bounds of the tract granted, and has, by said survey and its uniform recognition, the expediente and the large sum paid for said tract, given a practical construction of said words 'cuatro sitios' to be four leagues square.

"IV. That all the proceedings in connection with said title, from and including the presentation of the petition to and including the final act of grant, were regular and were duly authorized by law, and the respective officers mentioned in this expediente were duly authorized to perform the functions which they respectively purport to have performed in said expediente, and all facts stated in said expediente are true.

"V. That Ramon Romero died about the year 1873, leaving three sons, Francisco, Pedro, Inocencio, and two daughters, Juana and Dolores, now Juana de Ortega and Dolores de ——, heirs to his estate.

"V. That the attorneys for the petitioners have found difficulty in ascertaining the exact meaning of the word parcioneros, mentioned in the grant, and in ascertaining the relation which they bore, if any, to said Romero, the grantee; that there is now no record of the names of such parcioneros, so far as the attorneys can ascertain. Nevertheless, there is a very large number of persons who claim to be the heirs of said parcioneros and who claim an interest in said land as such heirs.

95 "VII. That it is impossible, without the aid of a court of general jurisdiction or a special tribunal invested with similar powers, to fully determine as to who are the present rightful owners of said land, if the parcioneros without being named in the grant were capable of taking and holding under it. This last question, if it must be determined in this proceeding, is respectfully left for decision by the proper departments without intervention of the attor-

neys as between the heirs of Romero and the heirs of those claimed to have been parcioneros.

"Most of the adverse claimants unite in this proceeding for the purpose of securing confirmation of the grant in such form as will not prejudice any of the parties in the settlement of the question of title as between themselves.

"VIII. That the grantees have paid taxes to the American Government on said land, whenever demanded, since 1853, amounting to about $2,000 in all.

"Therefore petitioners demand and pray that the title be confirmed and patented to the heirs or legal representatives of the person or persons who were entitled to take and hold under the original expediente for the use and benefit of those persons only who proved to be the true heirs of said ranch.

"(Signed) LINDLEY AND CORELLA,
Attorneys for Petitioners.

96 OFFICE OF THE SURVEYOR GENERAL,
TUCSON, A. T., *April 13th*, 1887.

I hereby certify that the paper attached hereto is a correct copy of the paper it purports to be a transcript of on file in this office.

[OFFICIAL SEAL.] JOHN HISE,
U. S. Surveyor General, District of Arizona.

Counsel for plaintiff objected to the introduction of this evidence on the ground that the same was irrelevant, incompetent, and immaterial.

The objection was overruled; to which ruling plaintiff's counsel instantly excepted.

Defendant's counsel then introduced and read in evidence the opinion and recommendation of the U. S. surveyor general for the Territory of Arizona on the Mexican grant or private land claim, the rancho San Rafael de la Zanja; which was objected to by counsel for plaintiff on the ground that the same was incompetent and because the surveyor general could only make a report to the land office, and this court, therefore, cannot pass upon it.

The objection was by the court overruled; to which ruling of the court counsel for plaintiff then and there instantly excepted.

(Which report, *and* et cetera, was in the words and figures following, to wit:)

97 *Opinion and Recommendation of the U. S. Surveyor General.*

The original title papers show the history of this case to be as follows, viz:

On the 19th of July, 1821, Don Manuel Bustillo, a citizen of the presidio of Santa Cruz, made a petition to the intendente denouncing three square leagues of land (tres sitios de tierra) adjoining the northern boundary of the presidial lands, and one square league more at the place called "El Cajoncita," on the side of the east, for

an estancia. In pursuance of said petition and by order of the intendente the usual proceedings of measurement, valuation, and publication were taken. In making the measurement the surveyor measured a tract of sixteen square leagues instead of four square leagues, as asked for in the petition of denouncement.

How this may have occurred will be explained hereafter.

The land for which petition was made was valued by the appointed appraisers at these rates, viz: Three square leagues at $60 each, for the reason that they contained running water, and one at $30.00, because it could only be watered by wells; these prices per square league being those fixed by law, according to the character of the land, and below which it could not be sold. After the thirty days of publication and on the day of sale one Ramon Romero, a citizen of the presidio of Santa Cruz, appeared for himself
98 and in behalf of other citizens of the presidio, and bid against the denouncer, Manuel Bustillo. These two parties bid alternately against each other until the price of the four square leagues was run up to $1,200, for which sum the said land was sold to Ramon Romero for himself and the citizens of the presidio of Santa Cruz.

This is one of the cases in which the proceedings were commenced under the officers of the Spanish Government, but were not concluded until after the independence of Mexico.

The grant was issued on May 15, 1825, by Juan Miguel Riesgo, commissary general of the State of the west, an officer duly authorized to make grants prior to the organization of the system of making them according to the law of August 4, 1824.

This grant gives four square leagues (cuatro sitios de tierra para cria de ganada mayor). There is no doubt as to the genuine character of the original title papers. Referring to this grant, Special Agent R. C. Hopkins reports as follows:

"The expediente, containing thirty-seven (37) pages, is found in the proper place in the archives, is written on the corresponding stamped paper, proceedings all regular, and shows no cause for suspicion. No formal grant is found in the expediente, but a note of registry that the title was issued on the expediente on the
99 15th of May, 1825; also certificate that the sum of $1,297.75 had been paid into the treasury, that being the amount at which the land had been sold (including costs)."

Claimants, by their attorneys, in their petition for confirmation of this grant, ask that sixteen square leagues, the quantity embraced within the measurement, be confirmed to them, and make this allegation, to wit: "That the words cuatro sitios, used in the expediente, by the laws, usages, and customs of the Mexican Government at that time, mean four leagues square;" and it is further alleged in the petition for confirmation that, by sundry acts in connection with the proceedings in this case, the Mexican Government has given a "practical construction of said words, cuatro sitios, to be four leagues square."

The laws, usages, and customs of the Mexican Government, with due respect to the attorneys in this case, do not, in my opinion, sustain such construction of the words "cuatro sitios." The words used

in the original papers are "cuatro sitios para cria de ganado mayor;" literally, four places for the raising of larger cattle.

The Ordinanzes de Tierras y Aguas, published by Mariano Galvan, a standard authority in relation to the measurements of land and water, thus describe the different Spanish land measures, as recognized by the Mexican Government: Sitio de ganada mayor: The figure of a sitio or estancia de ganada mayor is a square each
100 side of which is equal to 5,000 varas (one league). Anciently a measure was used called "el paso de Solomon" (the step of Solomon), being in length one vara and two-thirds, so that a league of 5,000 varas is equal to (three thousand) 3,000 paces of Solomon.

Sitio de ganada menor (literally, a place for the raising of the small stock): The figure of a sitio de estancia de ganada menor is a square each side of which is 3,333⅓ varas, embracing one-half of a square league.

Criadero de ganado mayor is a square equal to one-fourth part of a sitio de ganado mayor or a square league; hence each side of the square contains 2,500 varas, lineal. Criadero de ganado menor is a square equal to the fourth part of a sitio de ganado menor each side of which contains 1,666⅔ lineal varas.

Caballaria de tierra is a rectangular parallelogram of 552 by 1,104 varas.

The ordinanzas of 1589 declare that the sitios de ganado mayor y menor may be measured in a circular form, the radius of which for the sitio de ganado mayor shall be equal to 1,500 paces of Solomon, equal to one-half of a league, and that a circular sitio de ganado menor shall have a radius of 1,000 paces of Solomon. This circular measurement, as a matter of course, gives an area of less than one square league to the sitio de ganado mayor and less than half a square to the sitio de ganado menor; but this circular form
101 of measurement was manifestly objectionable, since necessarily valdios or vacancies were left between the adjoining sitios, and it was prohibited on and after July 16, 1819.

The authority quoted shows that the terms sitio de ganado mayor and sitio de ganado menor were in ancient use in Spanish agragian measurements; that the first embraced an area of one square league when in a square form, and the second an area of half a square league, and also that they were adopted by the Mexican Government.

But independent of the authority referred to an examination of the original title papers in this case, in connection with the laws under which the land was petitioned for, together with the records of contemporaneous grants, conclusively shows that but four square leagues were asked for by the petition, and that only this quantity was appraised, sold, and given in the grant. The provisional law of May 20, 1825, in grading the value of the different qualities of the public lands, fixes the price per sitio (square league) of land containing running water at $60.00, and those upon which water could only be obtained by wells or artificial means at $30.00 per sitio. It is true that this law bears date subsequent to the proceedings of denouncement in the present case, but doubtless the same law was in

force under the Spanish Government at the date of the denouncement, and that the government of the State of the west in
102 1825 provisionally adopted the Spanish law, which continued in force until the passage of the organic law of 1834.

Manuel Bustillo, the denouncer, petitioned the intendente for four square leagues (cuatro sitios para de ganado mayor) bordering on the presidial lands of Santa Cruz. The petition was admitted and the commandante of the presidio was ordered to measure the lands asked for, and he complied with the order, after which experts were appointed to value the land. These experts valued three sitios (square leagues) at $60.00 per sitio, because they contained running water, and one sitio (square league) at $30.00, for the reason that it contained no water except such as could be obtained by artificial means. These valuations correspond with the prices as fixed by law for vacant public lands. In other grants made about the time of this denouncement, as the original title papers show, in every case the sitio de ganado mayor, as measured, embraced one square league, or a square of 5,000 varas.

It is quite probable that the commissioner under whose direction the measurements in this case were made innocently and in good faith caused a survey to be made which included sixteen instead of four square leagues.

This may seem strange in view of what is required of a surveyor and civil engineer of the present day; but there were no solar
103 compasses in the country at that time, and it is probable that the commissioner who surveyed this rancho was somewhat deficient in mathematical knowledge. It is a notorious fact that in the early settlement of California by Americans the simple-minded Californian was sometimes cheated out of his land for the reason that he did not know, for example, the difference between two square leagues and two leagues square. Some of them were beguiled by unscrupulous purchasers to sign deeds for a certain number of leagues square instead of (as they believed) square leagues. A case of this kind occurred in 1850 with one of the most intelligent of the native Californians (Don Jose de los Santos Berreyesa), and in 1835 the vague ideas of the Californians regarding land measurements was made the subject of a resolution by the territorial Legislature of that year, pending which there was an interesting debate fully illustrating the correctness of the position taken in this document touching the subject, and conclusively showing that many people of more than average intelligence did not understand the real difference between a certain number of square measures and measures square.

In the Senate of the United States, May 19, 1860, Mr. Benjamin, an eminent lawyer and accomplished Spanish scholar, made a report from the Committee of Private Land Claims on a number of cases, and among them that of John Scolly and others to a claim
104 for confirmation of twenty-five square leagues, which claim was supported by a recommendation of the surveyor general for New Mexico. On behalf of the committee, Senator Benjamin used this language in the report, viz: "A careful examination of this

claim, the evidence given in support of it, and the report of the surveyor general have failed to satisfy your committee that said claim is valid for more than five square leagues. The grant was for 'cinco leguas cuadradas,' which your committee interpret as meaning five square leagues and not five leagues square, and although the claimants were put in possession of five leagues square—that is, of twenty-five square leagues—yet this was done by a local magistrate only two years before the acquisition of the territory by the United States, and does not seem even to have been brought to the notice of or to have been approved by the superior authorities. The claim made is under a petition which originally prayed for 'deiz leguas cuadrados'—that is, for ten square leagues—and after various proceedings were restricted, according to the language of the petitioners themselves, to 'cinco leaguas cuadradas.' The two expressions are identical in form, and if by cinco leguas cuaradas twenty-five square leagues were meant, then under the original petition the prayer for a grant of diez leguas cuadraas was a prayer for one hundred square leagues. The proposition is too extravagant for belief, and your committee therefore recommend that the confirmation of the claim of Scolly and others be restricted to five square leagues."

105 In like manner, and for the same and other reasons, I regard the claim of attorneys in this case to sixteen square leagues as too extravagant for belief. However, as the attorneys seem quite earnest in their interpretations of said phrase, I will say further that if they are right, then, according to the experts who valued the land, twelve square leagues of the tract measured, and for which confirmation is now sought, must contain running water, for they report that three of the four sitios are thus watered. From a personal knowledge of the locality I can confidently state that in the valley in which the land is located twelve square leagues containing running water cannot be found; and, further, the measurement extends to the summit of the Sierra Plomosa, which is what is now called the Patagonia Mountains, and embraces a considerable and perhaps the larger portion of the rich mineral district known by the name of Patagonia.

The petition asks for land para cria de ganado mayor (for grazing purposes) and was not intendod to embrace a mineral region.

Early Occupation and Abandonment.

The testimony in the case shows that the said rancho was once occupied in good faith by the original grantees, and that to this day they or their legal representatives made a practical use of it and jointly pay taxes thereon to the county of Pima and Territory of Arizona.

106 It also shows the cause of abandonment to have been an irresistible and desolating war by the Apache Indians. The testimony in respect to this warfare corresponds in time and effect to that of the current history of the country from 1833 forward. The attempts of grantees to continuously occupy the said rancho cost them and their heirs many lives of themselves and associates. No

people ever exhibited stronger attachment to their homes than these, and their good faith could not have been shown at greater sacrifice unless they had remained and fought until all had been killed or carried into captivity, little, if at all, preferable to death.

Mines and Minerals.

The testimony shows the rancho of San Rafael de la Zanja to contain mines and minerals.

This testimony was doubtless given under the belief that the grant lawfully embraces all the lands within the measurements as shown in the original title papers. It probably contains some mineral land of [if] the area be restricted, as I recommend it should be, to four square leagues—that is, to a square the sides of which shall be one hundred cords or one league from the initial or central point named in the grant. In any event the confirmation, if in accordance with the laws, usages, and customs of Spain and Mexico up to the present day, must contain a reservation of the mines and minerals.

The petition of denouncement was for pasturage land, and
107 as such it was appraised, sold, and granted. In Sonora, at this day, miners go upon private lands, prospect, find mines, denounce, and work them without protest from the owner for pasturage or agriculture, or both.

Within a few months just past a case of this kind occurred in Sonora, viz: An undisputed owner and actual occupant of a valid grant of land for pasturage and agriculture discovered minerals in his own land and put miners to work developing the same for mining purposes, but did not denounce the mine as required by law. Other men discovered the omission, denounced the mine, took possession, and worked it without objection from the actual owner for agriculture and pasturage.

In adjudicating titles to grants of land by Spain and Mexico the United States is bound by custom, treaty stipulations, Supreme Court decisions, and common justice to confirm to the grantees or their legal representatives all the rights to or in the land which they obtained from the Spanish and Mexican Governments, and no more, and neither of these governments ever granted or intended to grant minerals, whether discovered or undiscovered, in the lands when granted to a petitioner for lands for agriculture or pasturage.

No fact is better known to the Mexican people nor more uniformly acted upon by the Spanish and Mexican authorities than that any one has a right to dig for and have the benefit of min-
108 erals found on the public lands or upon the lands belonging to individuals on conditions which are clearly defined by law, of easy compliance by the miner, and beyond the power of the owner to prescribe or determine.

The grant of the "San Rafael de la Zanja" was made to Ramon Romero and parcioneros or other citizens of Santa Cruz without naming them; therefore it is manifest that no deraignment of title can be made from the original grantees down to the present claimants.

I therefore recommend the confirmation to the legal representatives of the original grantees of the Rancho "San Rafael de la Zanja" to the extent of four square leagues, and no more, to be so located as to include the initial or central point of the original survey.

JOHN WASSON,
U. S. Surveyor General.

U. S. surveyor general's office, Tucson, Arizona, 4, 28, 1880.

Defendant offered in evidence, for the purpose of showing that the lands in controversy were reserved, the following document:

"Secretary Teller to Commissioner McFarland."

MARCH 3RD, 1885.

I have considered the appeal of Colin Cameron from your decision of December 4, 1884, declining to authorize a preliminary survey of the "Rancho San Rafael de la Zanja," in Arizona, to
109 the extent of sixteen square leagues, a preliminary survey thereof having once already been made covering four square leagues only, and reported to Congress by Surveyor General Wasson's report of April 28, 1880, recommending confirmation to the latter extent only, transmitted to the body on December 9, 1880.

This claim has heretofore been the subject of departmental consideration in view of pending action by Congress, your recommendation of April 28, 1882, for confirmation by the larger boundaries having been overruled by my predecessor's letter of April 18, 1882, addressed to Hon. R. Pacheco, chairman of the House Committee on Private Land Claims, wherein he adhered to the original recommendation of the surveyor general.

In view of the fact of such pendency before Congress and of the departmental opinion aforesaid, you decline to authorize the survey now applied for, holding that the executive jurisdiction of the subject-matter is concluded.

It is true a recommendation has been made for a specific confirmation by surveyed boundaries, and if that were the conceded extent of the claim and the question were one upon title alone there could be no private claim outside that survey; but the extent is the only disputed matter before Congress, except, it may be, the merely incidental one of ascertaining the names and whereabouts of
110 a portion of the grantees, as the validity of the grant is not drawn in question; and it is admitted, so far as the opinions go, that so much at least belongs to the same. Now, there being a claim pending in Congress, which was also presented to the surveyor general and decided adversely by him, to have a confirmation by the metes and bounds set up by the claimants, it is proper to inquire what lands are reserved by law.

The statute defines them: "Until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or disposal by the Government," etc.—that is, all claims reported upon by him and in which he shall have given "his decision as to the validity or invalidity" under his authority to "ascertain the

origin, nature, character, and extent." There being an issue here taken as to the validity of this claim for an extent greater than has been awarded by the surveyor general, the duty to reserve the lands is clearly incumbent on this Department; and if that can best be done by a preliminary survey to fix their identity, the claimants paying the expenses, I am of the opinion it is lawful and should be allowed.

Of course nothing in such proceeding can be construed as a recognition of the validity of the claim, that being a matter for expression by authoritative opinion when called upon by Congress for recommendation. The survey should simply show and exactly de-
111 fine the claimed boundaries by the monuments of possession, leaving unaffected the final adjudication committed by law to Congress and not to this Department. Your action is therefore modified in accordance with the foregoing."

Counsel for plaintiff objected to same as irrelevant and immaterial. The court sustained the objection; to which ruling of the court counsel for defendant then and there instantly excepted.

GEORGE J. ROSKRUGE, a witness called and sworn on behalf of the defendant, testified as follows:

I am a surveyor, and have been so for about twelve or thirteen years. I am county surveyor of this county, and have been such about five years. I have read a translation of the expediente of the private land claim San Rafael de la Zanja as filed in the office of the surveyor general of Arizona——

(Which testimony is objected to by counsel for plaintiff, and the objection was by the court overruled.)

(Continuing)—and located upon the ground the location monuments described in the expediente.

(Which testimony is objected to by counsel for plaintiff, and the objection overruled.)

At this point a map made by witness of the private land claim or Mexican grant, the San Rafael de la Zanja, was presented
112 to the court and offered in evidence by defendant as Exhibit "A," and the witness continued as follows:

(Pointing to the map.) I found the centre monument at the ruins of old San Rafael; it was a monument of stones, and I also found there foundations of old huts. It was a loose pile of stones. There was no mark on it; it was just a pile of stones. I thought it was the centre monument, because I was informed that it was the ruins of the old San Rafael, which was the initial point of the old land grant. I assumed it to be the centre monument on that information. I found those ruins by measuring from a south centre monument two hundred cordels, and that brought me right opposite the ruins. The two hundred cordels made five miles sixteen chains and sixty-six links. I measured that some five or six years ago. The first monument down below there was pointed out to me as

being the south centre of this grant and also the north centre of the presidio lands of Santa Cruz, Sonora, by a man named Scott. He pointed them out to me. I found a monument of stones there about that high (indicating about three feet) without any mark on it. Then the monument at San Antonio pass, right between the two little hills, six miles from the south centre monument; that answers the call of the expediente.

I have never made a cordel out in feet or yards. A vara is 33 inches and a cordel is fifty varas; 200 cordels is two
113 leagues. I have got this all in English miles. I went then to the San Antonio pass and found the large monuments of stones there, between the two hills, answering the description of the expediente; and then I started from the south centre monument and went up the potrero, and on the east bank there (indicating on map referred to above) I found another monument, answering the 200 cordels, running from the initial monument. In finding these monuments I followed out the expediente as near as could be; for instance, this course here running two hundred cordels east. This is all rolling hills here, and there at the edge of the mesa we found a large monument. Then we went north, and at the edge of this mesa, where there is a canyon running towards the penasco, we found a tree, with stones around about it, about ten miles from the centre monument, and then in running east along here at the point of the Huachuca Mountains, known as the Sierra del Cobre, we found another large monument, the existence of which answers the description as being at that point. It is over that spring; and then coming down here (indicating) there is an old monument, which would be a point of this Sierra Colorado or red hill, and there I found another monument and the hill described as the El Caloso. I got that by triangulation; I didn't go over that hill at all. That is one of the landmarks.

114 Turkey creek is up here (indicating on map), and Smythe's cieñega is here (indicating), and that is about a mile and a quarter from the northern line of this claim, getting down to the edge of the boundary of this fence (which was the fence described in the complaint), and it is about four miles west of the eastern line of the claim.

Having read the expediente, I can say that this map is a correct representation of the land included in this expediente, as well as I could read it, with the monuments and the natural points, as included in the expediente.

(Which testimony as to the correctness of the map and its admissibility in evidence was objected to by counsel for plaintiff. The court overruled the objection; to which ruling of the court counsel for plaintiff instantly excepted.)

Each of the monuments answered the calls of the expediente. The wire fence is represented as being on Smythe's cienega, which is marked by this red line (indicating). It is south of Turkey creek, and on the Turkey creek, and the wire fence goes that way (indicating further south). It is also known as the old French Louis place.

The fence mentioned in the complaint is a mile and a quarter south of the northern line and about four miles west of the east line of the Rancho San Rafael de la Zanja, according to the calls, courses, and distances of the expediente, and that fence is
115 within the exterior lines of the claim as ascertained by me from the expediente.

I made the survey on the ground and prepared this map from the field-notes, and it is an accurate map—as accurate as I can make it.

The fence is about ten miles from the centre monument. Colin Cameron lives about three or four miles from the centre monument southwest.

I found no other monuments in making the survey there but this national boundary monument here (indicating on map). Part of this is in Mexico. This (indicating) is Arizona and this (indicating) Sonora.

(Being cross-examined, the witness testified:)

Colin Cameron lives about four miles from the centre monument. I neither found nor saw any other monument there. Those on the map are the only ones I saw. The fence was some ten miles from the centre monument, in a northeasterly direction.

BREWSTER CAMERON, a witness called and sworn on behalf of the defendant, testified as follows:

I was present when the survey of this claim was made by Mr. Roskruge and when the photographs were taken—all but one or two of them—of the monuments. I will point those out when I come to them. The photographs which were taken while I was present were as follows: The expediente calls for a monument
116 beginning at the initial point and running south—a monument at the Potrero canyon. I was present when a photograph of the Potrero canyon was taken, pointing to the northeast; right up that canyon that photograph was taken, and I was present when that photograph was taken. I was also present when the photograph was taken from the mesa here towards "El Caloso," showing this monument and El Caloso in the distance. This is the initial monument, and I was present when the photographs were taken at San Rafael, the camera pointing in the direction of El Caloso. The photographer then, pointing the camera in the direction of the east, *and* photographed the old San Rafael ruins—ruins of the old Mexican town—which are plainly visible on the ground, the walls being crumbled, but it was a large town, with a road running between the two portions of the town. Then we came down to the south centre monument (indicating), which is the north middle monument of the presidio lands of Santa Cruz. The camera was then turned in the direction of the Potrero canyon, one of the landmarks called for in the expediente. I was present when the photograph was taken of the southeast monument of this grant—the northeast monument of the presidio lands of Santa Cruz—a great large pile of stone.

I am perfectly familiar with all of the monuments of the presidio

of Santa Cruz. This is a large flat monument grown over with grass and bushes, and then this east centre monument; the camera was turned towards the potrero.

117 I was present then. This Potrero canyon runs down by the south centre monument of the San Rafael grant.

The camera stood at the east side of this monument pointing towards the west, so that the view would show the canyon upon the photographs of which this monument is taken. I was present at the Sierra del Cobre Mountains when this photograph was taken (indicating). The camera was pointing towards the mountains.

Then I was present afterwards when a photograph was taken of the El Carricillo spring, which showed the water and also the tule grown up here in the water, called the Carricillo weed, I believe; and then I was present when a photograph was taken due east from this northeast monument, the camera being turned towards the east, which showed that this monument was right by the point of the Sierra del Cobre Mountains called for in the expediente.

I was present when a photograph was taken of this tree, which stands on the bank of the arroya. We took two views of that tree, one with the camera standing close and pointing towards the north so as to show the body of the tree; the size of the tree as compared with the body of a man, a man standing beside the tree, and my little boy sat up in the limbs; and then we took another photograph of that corner from the east side of the tree, pointing towards the penasco here, so as to show that the tree stood on the

118 bank of an arroya, and also to show the full top of the tree in the distance.

That canyon on which this large tree is situated rises a little above it and flows right past the tree and right over towards the penasco, the arroya. We took a second photograph from the mesa, a little to the west of the tree, showing the arroya. Then, as we went, beginning at the initial monument here, with a view of locating the north centre monument here, we run due north, and in all that distance I did not find a single arroya which runs towards the penasco till we got to this one where we found the tree.

We also found in running north that it was impossible to see the point of the Sierra del Cobre Mountains till we crossed the Canille hills, or a portion of them. After we had gone over them we could see the point of the mountains and also this red hill—both of those points—so we turned our camera then towards the west and took a view of the red mountain here (indicating) in the distance, showing that these two mountains could be seen from that point. This penasco is a large rock, a prominent mark, and the only rough, ragged rock in that country. We took a photograph of the penasco from the east, showing its broken condition, like the photograph here (exhibiting same), and we also took a photograph from the south of it, and then we came over to the northwest and found a red hill with stones lying right at the point of the red mount-

119 ain. At the bottom of that we found an old monument, except not so large as the centre monument at the San Rafael. This monument, like the northeast monument of the presidio, was

all grown over with grass. From that point we took a photograph of the penasco. Those are the monuments that I saw photographs taken of in person.

Then I took the photographer over here (indicating) and requested him to take a view from there. First I went to the point of this red mountain here and took a photograph of it, and then I took him up there (indicating) and told him where I wanted him to take a position to see that red hill, and I saw it, and I see here the photograph like it, and I know it just like I would know a photograph of myself. I am perfectly familiar with that. So he took that, and then I went with him to that San Antonio pass, which is the southwest corner monument of the grant, and he took a photograph of the monument at that point in the presence of Mr. Roskruge and myself; and then we went to the San Antonio pass, and there he took a photograph of the hills where this monument is and called for in the expediente.

Now, then, so much for the photography.

As to the location I can describe just how we found the location of those, how we determined where they were, if counsel desires it.

I am familiar with the calls of the expediente, and say that
120 this map represents the tract of land described in the expediente as donated by the natural landmarks therein called for; I say this of my own knowledge. The line from the south centre monument to the Pass San Antonio and from the south centre monument to the southeast corner of this tract is called the northern boundary of the presidio lands of Santa Cruz.

(The photographs referred to were then introduced in evidence by counsel for defendant.)

Now, I think, as a matter of fact, that we should describe the method in which we ascertained the manner in which they were located—the manner in which the monuments were located. We started from the initial monument, which is the old San Rafael, and went north, and, as I said, we did not find any arroya running towards the penasco till we got to the hills, and when we got up there we could see the point of the Del Cobre Mountains and the spring, as called for in the expediente. Looking towards the west we saw the end of this red hill—red mountain—which was just as red as kiel, and when we went to the point of the Sierra del Cobre there we found a monument answering the calls of the expediente, and also pointed out to us by old Mexicans, who had been at that point, according to common report, for thirty-five years or more. At the red hill we found this old monument grown up with grass. Looking from the initial monument to the west you see a lime
121 peak, which is the only lime that is prominent in that range and is visible from the whole country around. Going from San Antonio pass we found the monument there located right at these two little hills (indicating) called for in the expediente, and which, as the photograph shows, are just as plain as the two eyes in a man's face. The monument at the mouth of the potrero—the canada comes down very plainly to that point. That monument is on

a little hill, and it was pointed out to me by a number of old residents of Santa Cruz. At the southeast there is also a monument, which was pointed out in the same way. It is a very old monument. We rode along this potrero in order to locate the east centre monument—the east bank of the potrero canyon (indicating)—till we came to this point. The expediente states that the east centre monument must be on the east bank of the potrero canyon; so we found it, and I have already pointed out the others, so that every monument represented on this map was found upon the ground, agreeing with the explicit calls of the expediente. The fence described in the complaint is in Smythe's cienega—what was formerly known as the old French Louis place—a little more than a mile south of the northern boundary of the grant as described by the expediente and about four miles west of the eastern boundary—just four miles or a little more—and within the claimed limits of the grant, the north line being a little over a mile away and that being the nearest.

122 (Upon cross-examination the witness testified as follows:)

I am sure that this map is correct. I am familiar with the various matters on it. That dotted line is an imaginary line which was put there by Mr. Roskruge. It represents a little boot, a sketch of which was made by the surveyor general, Mr. Wasson, originally.

GEORGE J. ROSKRUGE, a witness previously called and sworn on behalf of the defendant, is recalled on behalf of the plaintiff for further cross-examination:

That dotted line on the map (indicating) represents four square leagues as surveyed under instructions of Mr. Wasson.

Counsel for defendant objects to this testimony as to anything made under instructions of Mr. Wasson. The court ruled that the witness could be examined as to anything appearing upon the map; to which ruling of the court counsel for the defendant then and there instantly excepted.

I could not swear to what it is, of my own knowledge. That map is supposed to be correct. The supposition is that it is put on there correct and it would represent that survey. I do not know whether that survey was correct. I have my doubts about its being correct.

Counsel for the defendant then put the following question to the witness:

Don't you know that the survey is not correct?

123 Which question was objected to by counsel for the plaintiff, and the court sustained the objection; to which ruling of the court defendant, by his counsel, then and there instantly excepted.

The data that I used to make that survey indicated by the red lines there, representing the Wasson survey, was a tracing that I got

from Allis' map, and I put on this map a tracing of Allis' survey as I understood it. I was not there when Allis surveyed it, but put it there to conform to my boundaries.

It was then admitted by counsel for plaintiff, for all purposes of this trial, but for no other purpose, that the defendant, Colin Cameron, is the grantee and successor in interest of all the right, title, or interest which ever came to Ramon Romero or to his heirs or any or either of them under said Mexican grant, San Rafael de la Zanja, as the same was granted by the Mexican Government.

Whereupon defendant rested his case.

Counsel for plaintiff then introduced in evidence the survey of Mr. Wasson, former surveyor general of the Territory of Arizona, of the four square leagues corresponding with the dotted lines
124 that are mentioned and shown on the map made by Mr. Roskruge and introduced in evidence by the defendant.

Which was objected to by counsel for defendant as being incompetent and immaterial and irrelevant and outside of the issues in this case, and because the same was only a preliminary survey and is no evidence, nor does it tend to show that the lands within the inclosure described in the complaint are now or ever were public lands of the United States, or that the defendant has no claim or color of title, made in good faith, to all of said lands.

But the court sustained the objection; to which ruling of the court counsel for the plaintiff then and there instantly excepted, and the said survey was, by the plaintiff, introduced in evidence.

Plaintiff also offered in evidence a map made by Allis from said survey to show that the red lines indicating the Wasson survey on a map made by Roskruge are correct. Plaintiff also introduced in that connection Surveyor General Wasson's report of said survey.

To all of which defendant objected. The court overruled the objection; to which ruling of the court defendant then and there instantly excepted.

By permission of the court defendant recalled COLIN CAMERON to prove that after making the contract with Mr. Richardson, as testified to by him, he went into possession of the premises in dis-
125 pute, and the case was reopened for that purpose, and COLIN CAMERON testified further as follows:

I went into possession of the San Rafael de la Zanja on the 8th of May, 1883. The authority under which I entered into possession was a contract or assignment of contract of sale with R. R. Richardson; it was a contract which A. A. Green had with R. R. Richardson, and Mr. Richardson was in possession at the time I took the assignment and let me into possession.

At the time I went into possession I knew of the expediente or title papers from the Mexican Government, and I claimed that I was going into possession of all the lands described in the expediente or title papers from the Mexican Government. Before I went out to look at the land I was shown the expediente, and then I was taken out and shown the ground, and I went into the possession of the

whole of it, as called for in the expediente, and the expediente was explained to me by Mr. Hopkins.

(To this testimony counsel for the plaintiff objected.)

By going into possession I mean I went on the ground in person. I drove out there in a wagon first, and then I got a horse and rode over the whole tract and looked over it, and I made up my mind it was such a piece of land as I would choose to buy. Then I came back to Tucson and went into the surveyor general's office and asked to see——

(Here the witness was interrupted.)

In relation to what I did in locating there or going into possession, I located there and bought cattle that were there, and put men in charge of them and have been in there since.
126 There were some portions of the grant that people were located on, not knowing it was a grant, and I bought them out and the cattle with them—the cattle that they had and their improvements at the time. Ever since that time I have lived on the San Rafael grant. The headquarters is at Zanja, right at the centre of the tract. I live some four or five miles southwest of that point, but still on the grant.

I located stock and employees at other portions of the grant clear to the exterior boundaries.

Being cross-examined, the witness testified as follows:

I simply placed cattle on the land and employees to take care of them.

I had no surveyor with me when I was riding around, but I immediately took one out, and with the expediente we located the grant before I bought it.

He was a Government surveyor of the United States—a deputy—and I had the lines run to know exactly what was there and where they were. J. B. McLaughlin, I think, was his name. He went at my expense only. I paid him for it myself. He was not sent there by the order of any person, but went to locate the ground so that I myself would know where the lines were.

The boundary lines that he showed me were exactly the same as Mr. Roskruge exhibited upon this map that he made.

Counsel for plaintiff then offered in evidence the act of Congress providing for the preliminary survey of unconfirmed
127 private land claims in Arizona Territory.

This was all the testimony in the case, and the case was closed. The defendant then and there instantly presented this his bill of exceptions to the rulings of the court and prayed that the same might be allowed and signed and made a part of the record in this case.

All of which was accordingly done.

WM. H. BARNES, *Judge.*

128 Know all men by these presents that we, Colin Cameron as principal, and Brewster Cameron and Albert Steinfeld, as sureties, are held are firmly bound unto the United States of America in the penal sum of one thousand one hundred dollars; for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas the United States of America recovered a judgment against the above-bounden Colin Cameron in the district court of the first judicial district of the Territory of Arizona on the twenty-second day of October, A. D. 1887, which said judgment was made and entered in a certain cause in said court then pending, wherein The United States of America was plaintiff and the above-bounden Colin Cameron was defendant, which judgment was to the effect that a certain fence around lands described in the complaint in said cause filed be removed by said Colin Cameron within five days from the date of the entry of said judgment, or upon his failure so to do within the said five days that the said fence be forthwith removed by the marshal of the United States for the district of Arizona;

And whereas the above-bounden Colin Cameron has appealed from the judgment of the said district court to the supreme
129 court of the Territory of Arizona, and desires to suspend the execution of said judgment:

Now, therefore, if the said Colin Cameron shall prosecute the said appeal with effect, and, in case the judgment of the appellate court shall be against him, shall well and truly perform its judgment, sentence, or decree, and pay all damages as may be awarded against him upon the said appeal, then this obligation to be void; otherwise to be and remain in full force and effect.

In testimony whereof we have hereunto set our hands and seals this twenty-second day of October, A. D. 1887.

COLIN CAMERON.
BREWSTER CAMERON.
ALBERT STEINFELD.

TERRITORY OF ARIZONA, } *ss:*
County of Pima, }

Brewster Cameron and Albert Steinfeld, being severally sworn according to law, each for himself on his oath deposeth and saith that he is a freeholder and resident in the said county of Pima, Territory of Arizona, and is worth at least the sum of eleven hundred dollars over and above his just debts and liabilities and the property exempt from execution, as provided by law.

BREWSTER CAMERON.
ALBERT STEINFELD.

130 Subscribed and sworn to before me, at Tucson, Arizona, this 22d day of October, 1887.

[SEAL.]

ABEL S. DUNGAN,
Notary Public, Pima County, A. T.

Indorsed: The within bond approved Oct. 27th, 1887. J. H. Martin, clerk.

Indorsed: Filed Oct. 27, '87. J. H. Martin, clerk.

Plaintiff's costs (clerk)--- $14 20
Defendant's costs ------- 83 65

131 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES OF AMERICA, Appellee,
vs.
COLIN CAMERON, Appellant.

Assignment of Error on Appeal.

1st. The judgment and decision was contrary to the evidence in this, that it nowhere appeared from the evidence that the defendant maintained the fence described in the complaint without any claim or color of title made or asserted in good faith.

2d. The judgment and decision is contrary to the evidence, because it affirmatively appears from the evidence that long prior to the bringing of this action the defendant claimed an interest in and to the Spanish or Mexican grant, San Rafael de la Zanja, and was let into the possession thereof by R. R. Richardson in 1880, since which time defendant has claimed the right to the possession of said grant to the exterior boundaries thereof as the same were measured by the Mexican Government and called for in the expediente by which said grant was made; and the evidence further shows conclusively that the lands inclosed by the fence mentioned in this action are within said boundaries.

The evidence also shows that said grant has been pro-
132 nounced valid by the surveyor general of this Territory and recommended for confirmation to the extent of four square leagues; that said enclosed lands are not on the four square leagues surveyed by the order of said surveyor general, nor are they on the four square leagues cornering at the place called La Zanja, but are within the boundaries called for in the expediente and within the boundaries as always claimed by defendant and the prior claimants of said grant.

It further appears from the evidence that proceedings are now pending before Congress for the confirmation of said grant, the claimants demanding that it be confirmed to its full extent as called for in said expediente and the surveyor general recommending that it be confirmed only for four square leagues, and that said report has not yet been acted upon by Congress.

3rd. The court erred in permitting the plaintiff to prove the nature and character of the country in the neighborhood of said fence and in permitting plaintiff to introduce evidence to show that prior to the erection of the fence described in the complaint that, save for a small brush fence, the country was vacant in that neighborhood, and that there was no enclosure at the French Louis cienega.

4th. The court erred in not permitting defendant to ask the witness, R. R. Richardson, whether or not the lands embraced
133 in the fence mentioned in the complaint were within the claimed limits of the San Rafael ranch as it was claimed by the claimants when he first knew it.

5th. The court erred in not permitting the defendant to ask the following question of the witness, R. R. Richardson: "If at that time (when he first saw the French Louis cienega, in 1880) you knew where the claimed boundaries of the San Rafael de la Zanja Mexican land grant were?"

Also in not permitting defendant to ask witness whether or not the land called French Louis ranch was within the boundaries of the San Rafael Mexican land grant.

6th. The court erred in not permitting defendant to introduce the letter from the Secretary of the Interior of the United States to the U. S. surveyor general of Arizona withdrawing all of the lands embraced in the claimed limits of the said grant from location, sale, and entry for the purpose of showing that this was not land intended to be covered by the statute.

7th. The court erred in finding said fence to be unlawful and in finding that said fence was situated on the public lands of the United States.

8th. The court erred in not sustaining defendant's motion
134 to nonsuit the plaintiff for the reasons in said motion stated.

9th. The court erred in not sustaining defendant's motion in arrest of judgment for the reason in said motion stated.

10th. The court erred in overruling defendant's motion for a new trial of this action on the grounds stated in said motion.

11th. The judgment and decision are contrary to the law, as it fully appears from the testimony and the findings of the court that the lands enclosed are within the claimed boundaries of the Mexican land grant, San Rafael de la Zanja—a private land claim now pending before Congress for confirmation—and that said lands are not public lands of the United States, subject to entry and sale under the general laws of the United States, and that said lands were enclosed by the defendant under a claim of title made and acquired in good faith.

ROCHESTER FORD AND
JEFFORDS & FRANKLIN,
Att'ys for Appellant.

135 TERRITORY OF ARIZONA, } ss:
County of Pima, }

I, John H. Martin, clerk of the district court of the first judicial district of the Territory of Arizona, do hereby certify the foregoing to be a full, true, and correct transcript of the proceedings in the cause entitled The United States of America *vs.* Colin Cameron, in accordance with section 224 of chapter 20 of the civil procedure act of the Revised Statutes of the Territory of Arizona.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said district court this 30th day of November, A. D. 1887.

J. H. MARTIN, *Clerk.*

136 In the District Court of the First Judicial District of the Territory of Arizona.

UNITED STATES
vs.
COLIN CAMERON. } Bill of Exceptions.

This matter coming on to be heard on the twenty-second day of October, A. D. 1887, on defendant's motion to set aside the judgment rendered therein and to grant a new trial of said action; which motion was in the words and figures following, to wit:

(Title of court and cause.)

Now comes the above-named defendant and moves the court to vacate and set aside the judgment in this action and to grant a new trial of said action for the following grounds:

1st. Because the judgment is contrary to the evidence and the evidence is wholly insufficient to sustain the judgment.

2nd. Because the said judgment is contrary to the law.

3rd. Because the court erred in overruling defendant's motion to nonsuit the plaintiff on the grounds stated in said motion.

4th. Because the court erred in admitting improper evidence against the defendant's objection.

137 5th. Because the court erred in excluding evidence offered by the defendant which was material to the issue in said action.

6th. The court erred in overruling the defendant's motion in arrest of judgment for the reasons set forth in said motion.

ROCHESTER FORD AND
JEFFORDS & FRANKLIN,
Attorneys for Def't.

And the court, having heard the motion, overruled the same; to which ruling of the court defendant, by his counsel, then and there instantly excepted and tendered this his bill of exceptions to the court, the same being allowed and signed and made part of the record in this case.

All of which is accordingly done.

WM. H. BARNES, *Judge, &c.*

Title of court and cause.

This matter coming on to be heard on the twentieth day of October, A. D. 1887, on defendant's motion in arrest of judgment, which said motion was in the words and figures following, to wit:

(Title of court and cause.)

Now comes the defendant in the above-entitled action and moves the court in arrest of judgment in this case, on the ground that the court had no jurisdiction of the subject-matter of this action, for the reason that no authority existed for the institution of this suit,
138 because it does not appear from the complaint or anywhere else in the record of this case that an affidavit was filed with the attorney for the United States for the Territory of Arizona by any citizen of the United States to the effect that the defendant or any other person had violated section 1 of the act of Congress entitled "An act to prevent unlawful occupancy of the public lands," approved February 25, 1885.

ROCHESTER FORD AND
JEFFORDS AND FRANKLIN,
Attorneys for Defendant.

And the court, having heard the motion, overruled the same; to which ruling of the court defendant, by his counsel, then and there instantly excepted and tendered this his bill of exceptions to the court, the same being allowed and signed and made part of the record in this case.

All of which is accordingly done.

WM. H. BARNES, *Judge, &c.*

THE TERRITORY OF ARIZONA, }
County of Pima. }

I, J. H. Martin, clerk of the district court of the county of Pima, hereby certify that the foregoing is a true and correct transcript and copy of the bill of exceptions to the order of the court denying a motion for new trial and of the bill of exceptions to the order of the district court denying defendant's motion in arrest of judg-
139 ment in said action.

Witness my hand and seal this 15th day of March, 1888.

J. H. MARTIN, *Clerk.*

Indorsed: Filed March 15th, 188–. E. B. Dodge, clerk.

140 In the Supreme Court of the Territory of Arizona.

THE UNITED STATES OF AMERICA, Resp't, Pl't'f, and Appellee, *vs.* COLIN CAMERON, Def't and Appellant.	Appeal from District Court of First Judicial District; Barnes, Judge.

Messrs. Jeffords & Franklin and Rochester Ford, att'ys for appel't; O. T. Rouse, United States district attorney, for appellee.

Opinion of Barnes, A. J.

This is a civil suit in which plaintiff alleges that defendant has unlawfully enclosed a portion of the public lands in violation of sec-

tions one and two of the act entitled "An act to prevent unlawful occupancy of the public lands," approved February 25th, 1885.

The defendant admits the construction of a fence at the place alleged, but denies that the lands enclosed are public lands, and alleges that they are within the boundaries of the private land claim, San Rafael de la Zanja, a Mexican grant, which has been filed with the surveyor general of Arizona, as is provided for in the act of July 15th, 1870 (16 Stat. at Large, 304). There it is provided

141 that it shall be the duty of the surveyor general of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character, and extent of the claims to lands under the laws, usages, and customs of Spain and Mexico, and for this purpose he shall have all the powers conferred and shall perform all the duties enjoined upon the surveyor general of New Mexico by the eighth section of the act entitled "An act to establish the offices of surveyors general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers, and for other purposes," approved July twenty-second, eighteen hundred and fifty-four, and his report shall be laid before Congress for such action thereon as shall be deemed just and proper.

In the petition the claimants urged or laid claim to about sixteen square leagues, or about 117,000 acres of land.

As evidence thereof they filed with their petition title papers called an "expediente." The surveyor general reported that the claim was valid, and that the amount of land conveyed was four square leagues, three in a line, north and south, and one to the west of the southern square league. His report was laid before Congress, where the same awaits action. It is insisted that the report of the surveyor general is not competent evidence for any purpose, and it is so held in Pinkerton *vs.* Ledoix, 129 U. S. Reports.

142 This case has been argued by counsel upon the assumption that the act of 1870, above quoted, is the same as the act of 1854, referred to in the act of 1870. They, however, are not the same, but differ very materially. In the former law it was provided "And until the final action of Congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the Government." This provision was omitted from the act of 1870.

It was by this provision of the act of 1854 that lands were reserved. As this provision is not retained we must infer that it was omitted intentionally; that it was not intended that lands should be reserved, and no authority is given the surveyor general or the Secretary of the Interior to reserve from sale lands that were claimed to be included within a valid Mexican grant.

In other words, it is evident that Congress intended to retain control over the whole question and to delegate to no one beyond the limit of the terms of the act.

Boteller *vs.* Dominguez, 130 U. S. Reports.

The claimant under a grant acquired no higher, broader, or better right by the act of 1870.

The act simply afforded him a tribunal and a precedure to enforce his rights under the grant. It did not give him the right to fence — he did not have before, nor does the act of 1885 confer any right to fence. It prohibits the enclosure of the public lands.

143 In Ryan *vs.* R'y Co., 99 U. S., 388, the court says that lands embraced in such a claim (a Mexican grant) are to be regarded as forming a part of our public domain only after the claim conveying them has been finally rejected; but what is the "claim?" Is it the petition of the claimant? If so, this fence is within what he claims. If the petition mark the limits of the claim, then we are led to the absurd conclusion that under a valid grant for a few acres a claimant in his petition may insist upon a vast domain, no matter how wide, and at once fence it up, exclude everybody else from it, and retain the uses and profits of it until Congress shall act. No one can contend for a moment for such a construction of the acts of 1870 and 1885. With every claim filed with the surveyor general are filed the title papers upon which the claim is based as a part of it, and the lands therein described as granted thereby are the lands embraced in the claim. This brings us necessarily to a consideration of these title papers and forces the court to a construction of the same to see what lands are actually granted as a measure of the claim and color of title.

"Concessions or grants of land by Mexican governors were of three kinds." They were concessions or grants by—

First. Specific boundaries, where, of course, the donee is entitled to the entire tract.

144 Second. Or grants by quantity, as one or more sitios of land situated at some designated place or within a larger tract, described by what are called outboundaries, where the donee is entitled to the quantity specified and no more; or,

Third. Grants of a certain place or rancho by some particular name, either with or without specific boundaries. Higueras *vs.* U. S., 5 Wall., 834; Hornsby *vs.* U. S., 10 Wall., 332; Arviso *vs.* U. S., 8 Wall., 339.

With great ability and learning counsel for defendant has urged that this claim belongs to the first class. We are not able, however, to concur with this view, but must retain the opinion that it belongs to the second class. The Fremont case (17 How., 542) was held to belong to the second class. (Hornsby's case, *supra.*)

That was a petition for ten sitios (sitios de granda mayor) north of a river within the Sierra Nevada, in the east part of Merced, on the west, with the name Mariposas, and the grant was to a tract of land known as the Mariposas, within the limits before described. This grant is very similar to the one at bar, except that there was no survey of the place. This was held to be a grant of ten sitios, and the boundaries were held to no more than locate the place.

U. S. *vs.* Pico, 5th Wall., 539, is a case of the first and third class—a grant by boundaries, where the grant gives the boundaries, with no limitations as to the amount.

145 "When in Mexican grants boundaries are given and a limitation upon the quantity embraced within the boundaries is intended words expressing such intention are generally used."

Thus in Fremont case the boundaries embraced many sitios more than the quantity granted Pico case, *supra*. Higueras case, *supra*, was of the latter class. In Yontz case, 23rd Howard, 498, it was held in adjudicating these grants that it is proper to look at all the several parts and ceremonies necessary to complete the title and to take them as one act.

That "this court has uniformly held that the petition to the Governor for the land and its concession must be taken as one act, and the decree usually proceeded on the petition, which described the land as respected locality and quantity."

In that case "the application was for two sitios, more or less, according to the boundaries of said mission of San Jose."

The judgment of the court restricting the grant to two sitios was affirmed. Fassat's case, 20 Howard, 415, was a grant of a portion of the place known by the name "Los Capitancillos," and the portion thereof confirmed is bounded and described as follows, to wit (boundary): "The said premises containing three-fourths of a square league of land, a little more or less." Counsel in that case urged the same grounds as here and cited the same cases, p. 423.

146 But the court decides "we reject the words 'a little more or less' as having no meaning in a system of location and survey like that of the United States, and that the claim of the grantee is valid for the quantity clearly expressed." Had it not been so clear the court say "it might have been proper to refer to the petition and the diseno," etc. "But there is no necessity for adtional inquiries. The grant is not affected with any ambiguity."

It was held to be a grant for three-fourths of a sitio or square league. In D'Aguirre's case, 1 Wall., 316, the grant mentioned no quantity and reserved no surplus, and the court say the boundary must govern. The above-cited cases came up from California under the laws of the Mexican Republic. The claim before us was petitioned for of the Spanish Government, but the final decree was made by officers of the Republic. The laws were not, however, materially changed. The term sitio gandara mayor is a technical Spanish and Mexican legal term, as well established, defined, and known as a section or township in the surveys of the United States. It was a square "the fourth sides of which each measured 5,000 varas." (Hamilton's Mexican Law, p. 103). "The distance from the centre of each sitio to each of its sides should be measured directly to the cardinal points of the horizon and should be 2,500 varas."

147 This term is found in the case before us as well — in the cases cited. A conveyance of a sitio deeded as certain a form and quantity of land as a conveyance of a section. To convey a section would always mean a square, the side pointing to the four cardinal points, each one mile in length, containing 640 acres.

In this case a grant of four sitios is asked for, and nowhere throughout the whole expediente is any other quantity mentioned, and in the final decree the habendum clause grants four sitios. The price per sitio is appraised, three at $60, as having water, and one at $30. The whole expediente partakes largely of the nature of a ju-

dicial sale, and should be construed by the same rules—that is, strictly.

2 Com., 347 (Blackstone).
Hyman *vs.* Read, 13 Cal., 445.
Charles River Bridge *vs.* Warren Bridge, &c., 11 Peters, 589.

It is a procedure provided by law, invoked by grantee's petition, and should not be construed as a private deed or conveyance. The whole record should be taken and construed together in order to determine what is granted. So construing the case, it is evident that this is a grant of four sitios at the place San Rafael de la Zanja and no more.

It is urged that the words of limitation, viz., four sitios, are to be disregarded as *false demonstratie non nocet* and the survey be treated as meaning the land conveyed, and as that includes sixteen
148 instead of four sitios that must govern.

We are aware of the principle invoked, that where there is a doubt as to what is conveyed and where the boundary is certain and disagrees with the quantity mentioned the latter is *false non nocet.*

But this rule is established and can be invoked only to aid the evident intent. Where to apply the rule defeats the evident intent, it is disregarded (cases cited *supra*); and see—

Webb *vs.* Webb, 29 Ala, 606.
Davis *vs.* Rainsford, 17 Mass., 210.
Jackson *vs.* Moomis, 18 John., 81.
Norwood *vs.* Byrd, 1 Richardson, S. C., 135.
Jackson *vs.* Blodgett, 16 John., 172.
Proctoe *vs.* Pool, 4 Dev., 370.

Four sitios at the place La Zanja can be no other than the four sitios that touch that point—that is, that corner there. Any other construction makes this grant void for uncertainty.

Shackleford *vs.* Bailey, 25 Ill., 391; 10 New York, 630.

It is urged, however, against this view that the act of 1885 prohibited all enclosures of any public lands by any person who had "no claim or color of title thereto made or acquired in good faith;" and it is insisted that defendant claims to own the lands fenced and has urged his claim by petition to the surveyor general under the act of 1870, who has reported thereon, and that the claim is pending before Congress; that this is the very question there
149 pending; that his right thereto is the question in dispute; that that is the tribunal established for the consideration of the validity and extent of his grant.

That defendant urges before that tribunal that construction of this expediente which leads to a confirmation of his title to these lands. In short, that defendant has a claim and color of title to the lands fenced; and, if so, is not prohibited to fence the same by act of 1885. The evidence in this case shows that prior to the erection of the fence defendant had no exclusive possession of these lands.

They were open, unfenced, and apparently a part of the public domain. Cattle roamed and grazed over it. The only occupation defendant could claim was that cattle bearing his brand were ranging there. There was nothing to hinder other cattle ranging there. These acts do not constitute an open, notorious, and adverse possession, of which all are charged with notice. To determine whether defendant had claim or color of title we are driven to the deed or expediente upon which his color is based and by which he justifies. By possession or occupation he can acquire no claim or color of title as against the United States. He cannot hold by trespass and acquire an adverse title and defend the right to fence by claim or color of title so acquired; but we have seen he has not such possession, adverse to the United States or anybody else.

150 His claim or color of title can be based upon nothing but the paper title under which he claims, which is the expediente. He invokes it for his benefit. By virtue of it he fenced the lands and asserted right thereto. The court was driven then to look into his paper title to see what lands are conveyed, and hence to a construction thereof.

U. S. *vs.* C. & C. C. Co., 33 Fed. Rep., 323.

No one can claim color of title by deed when entering upon land beyond what this deed purports to convey.

Wood *vs.* Banks, 14 N. H., 111.
Brooks *vs.* Bruyn. 35 Ill., 394.
Shackleford *vs.* Bailey, 35 Ill.; 391.
Russel *vs.* Erin, 38 Ala., 48.
Minot *vs.* Brooks, 16 N. H., 376.
Tate *vs.* Southard, 3 Hawks, 16; 14 Am. D., 578.

Color of title is where there is "an apparent colorable title under which an entry or claim has been made in good faith."

Wright *vs.* Mattison, 18 How., 56.
Edgerton *vs.* Bird, 6 Wis., 527.
Thompson *vs.* Creig, 24 Tex., 594.
Bernal *vs.* Gleim, 33 Cal., 676.
Beverly *vs.* Burke, 9 Ga., 443.
Rannels *vs.* Rannels, 52 Mo., 112.

In Illinois a statute of limitation created a bar in favor of one in actual possession of lands under claim and color of title made in good faith. This statute is the same as the act of 1885, except that this act uses the words "claim or color," &c.

It was held that these words mean the same as color of title,

151 and the possession must be under a deed purporting to convey the lands claimed.

Woodward *vs.* Blanchard, 16 Ill., 433.
Dawley *vs.* Van Court, 21 Ill., 460.
Halloway *vs.* Clark, 27 Ill., 483.
Morrison *vs.* Horman, 47 Ill., 477.
Huls *vs.* Buntin, 47 Ill., 400.
Dickenson *vs.* Breeden, 30 Ill., 325.

Cook *vs.* Norton, 49 Ill., 203.
Chickering *vs.* Failes, 26 Ill., 510.
Fafflin *vs.* Herrington, 16 Ill., 301.
Hinkley *vs.* Green, 52 Ill., 27.
Dalton *vs.* Erb, 53 Ill., 289.
Fritz *vs.* Joiner, 54 Ill., 101.
Shackleford *vs.* Bailey, *supra.*

And it was decided that the court must determine the validity of the color of title. Shackleford *vs.* Bailey, *supra;* Blanchard *vs.* Pratt, 37 Ill., 245. See note to Tate *vs.* Southard, 14 Am. Decisions, 580.

There can therefore be no doubt as to the power of the court to look into defendant's paper title when he defends his right to fence those lands upon a "claim or color of title" derived from this paper title to ascertain the extent thereof, but not the validity of the grant.

As we have said above, the lands fenced are far away from the four sitios cornering at the point La Zanja, and include no lands ever occupied by or in possession of defendant under the deed. The evidence shows that the defendant occupies a ranch-house, out buildings, and corral, in all, a few acres, at La Noria, and another on another part of the premises claimed, and that cattle are
152 pastured on the surrounding domain.

The lands fenced are several miles away from any habitation or actual occupation. Such cannot be a claim or color of title in any sense.

The fence so erected was an unlawful enclosure of the public lands.

We see no error in the judgment, and the same must be affirmed.

JAS. H. WRIGHT, *C. J.*
WM. H. BARNES, *A. J.*
W. W. PORTER, *A. J.*

Indorsed: Opinion. Filed April 6th, 1889. J. E. Walker, clerk.

153 In the Supreme Court of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
COLIN CAMERON, Defendant and Appellant.

To the honorable the Supreme Court of the United States:

The appeal of *the* Colin Cameron, the above-named defendant and appellant, respectfully showeth: That on the sixth day of December, 1886, the above-named plaintiff filed its bill in the first judicial district court of the Territory of Arizona against the defendant and appellant, wherein said complainant sought to have a wire fence of defendant, which enclosed about eight hundred acres of land, removed from said lands within five days, and if not so removed that the same be destroyed at defendant's cost, said complainant alleging that said land so enclosed was public lands of the United States,

subject to entry under the general land laws of the United States as agricultural lands, and that the defendant had enclosed the same without any title or claim, or color of title or right made or acquired in good faith, and without having first made application to
154 acquire title thereto or any part thereof according to law.

That thereafter said defendant filed his pleas and answers denying that the land enclosed or any part thereof was then or ever had been public lands of the United States, either subject to entry under the general land laws of the United States or otherwise, denying that said defendant fenced said lands or any part thereof without any claim or color of title made or acquired in good faith, and affirmatively alleging himself to be the owner in fee of all of said enclosed lands under and by virtue of a certain perfect grant made by the Republic of Mexico to its grantors prior to the cession of said Territory to the United States.

That thereafter and on the eighteenth day of April, 1887, the said case came on for trial before the court, and the same was tried by the court without a jury. During said trial plaintiff offered evidence to which defendant duly objected; and, the objection being overruled, defendant duly excepted, and bill of exceptions thereof, duly signed, is of record in this cause. That defendant during said trial offered evidence to which plaintiff duly objected; and, objections being sustained, defendant duly excepted and filed his bill of exceptions thereto, the same being of record herein.

That thereafter and on the twenty-second day of October,
155 1887, the court entered its judgment and decree in said action, decreeing that the place where said inclosure was made was public lands of the United States; that said inclosure was unlawful, and that said fence be removed by defendant within five days, and that if not so done that the same be removed by the United States marshal of this Territory at the cost of defendant.

That thereafter and on the said twenty-second day of October, 1887, defendant made his motion for a new trial, which said motion was denied by the court; to which ruling of the court defendant duly excepted.

That thereafter and on the fifteenth day of November, 1887, defendant appealed from the judgment and decree aforesaid and from the order overruling motion for a new trial, and from the other orders and rulings in said action, to the supreme court of the Territory of Arizona.

That thereafter and on the sixth day of April, 1889, said supreme court of the Territory of Arizona made and pronounced a final decree in this cause, wherein the judgment and decree and the orders and rulings of the said lower court were affirmed.

That the property in controversy in this action is of the value of over five thousand dollars.

That this cause involves an authority exercised under the United States, to wit, the right of the United States and its officers,
156 and especially the marshal of the Territory of Arizona, to remove and destroy the fence or inclosure which includes the lands and premises of defendant.

Wherefore appellant appeals from the whole of said judgment and decree of the said supreme court of the Territory of Arizona, and respectfully prays that the judgment and decree of said supreme court, and that the complaint, demurrer, pleadings, statement of facts, findings of fact, bill of exceptions, records and proceedings in this action may be sent to the Supreme court of the United States without delay, and that the said Supreme Court may proceed to hear said cause anew, and that said judgment and decree of the supreme court of the Territory of Arizona may be reversed and a decree made adjudging that the lands in controversy are the private property of defendant and are not public lands of the United States, and that defendant has right, title, interest, and color of title made and asserted thereto in good faith, and that said action be dismissed against defendant.

ROCHESTER FORD,
Attorney for Defendant and Ap'l't.

Indorsed: Filed April 26th, 1889. J. E. Walker, clerk.

157 Know all men by these presents that we, Colin Cameron, as principal, and Brewster Cameron and Albert Steinfeld, as sureties, all of the county of Pima, Territory of Arizona, are held and firmly bound unto The United States of America in the sum of six thousand dollars, lawful money of the United States, to be paid unto the said The United States of America or their assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 16th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas the above-bounden Colin Cameron hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the cause of The United States of America against Colin Cameron by the supreme court of the Territory of Arizona, and, pending the hearing of said appeal, has prayed for a stay of execution:

Now, therefore, the condition of this obligation is such that if the said defendant and appellant, Colin Cameron, shall prosecute his said appeal and answer all costs and damages if he should fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

COLIN CAMERON. [SEAL.]
BREWSTER CAMERON. [SEAL.]
ALBERT STEINFELD. [SEAL.]

Signed, sealed, and delivered in presence of—
SELIM M. FRANKLIN.

158 TERRITORY OF ARIZONA, } ss:
County of Pima, }

Brewster Cameron and Albert Steinfeld, being duly severally sworn, each for himself, on his oath deposeth and saith that he is

one of the sureties named in and who executed the within bond; that he is a resident and freeholder of the said county of Pima, and that he is worth at least the sum for which he became surety on said bond over and above all his just debts and liabilities and in excess of the exemptions allowed by law.

BREWSTER CAMERON.
ALBERT STEINFELD.

Subscribed and sworn to before me, at Tucson, A. T., April 16th, A. D. 1889.

[SEAL.] SELIM M. FRANKLIN,
Notary Public, Pima County, A. T.

The above bond approved this 19th day of April, 1889.

JAMES H. WRIGHT,
Chief Justice of the Supreme Court of Arizona.

Indorsed: Filed April 26th, 1889. J. E. Walker, clerk.

159 In the Supreme Court of the Territory of Arizona.

UNITED STATES OF AMERICA *vs.* COLIN CAMERON.

Finding of Fact.

In the above-entitled cause the court finds the facts to be the same as found by the lower court and as appears in the record of this cause on file herein; and the said findings are hereby adopted as the findings of this court herein.

April 19th, 1889.

JAMES H. WRIGHT,
Chief Justice of the Supreme Court of Arizona.

Indorsed: Filed April 26th, 1889. J. E. Walker, clerk.

160 In the Supreme Court, Territory of Arizona.

UNITED STATES OF AMERICA
vs.
COLIN CAMERON. } Proof, and c.

TERRITORY OF ARIZONA,
County of Pima, } *ss:*

Brewster Cameron, being first duly sworn, says that he is a citizen of the Territory of Arizona and of the county of Pima; that he is personally acquainted with the premises and property in dispute in this cause, and that the value of the same is more than the sum of five thousand dollars, and that the value of the same is at least eight thousand dollars.

BREWSTER CAMERON.

Subscribed and sworn to before me, at Tucson, A. T., April 16th, A. D. 1889.

[SEAL.] BRYAN W. TICHENOR,
Notary Public, Pima Co., A. T.

TERRITORY OF ARIZONA, *County of Pima,* } ss:

George J. Roskruge, being first duly sworn according to law, on this oath deposeth and saith that he is the duly elected, qualified, and acting county surveyor of the said county of Pima, Territory of Arizona; that he is personally acquainted with the property
161 in dispute in the above-entitled cause, having surveyed the same; that the value of said property is more than the sum of five thousand dollars.

GEORGE J. ROSKRUGE.

Subscribed and sworn to before me, at Tucson, A. T., April 10th, A. D. 1889.

BRYAN W. TICHENOR,
Notary Public, Pima Co., A. T.

TERRITORY OF ARIZONA, *County of Pima,* } ss:

Selim M. Franklin, being duly sworn, on his oath deposeth and saith that he is one of the attorneys for the defendant in the above-entitled action and was such attorney of record in the district court of the first judicial district of the Territory of Arizona when said action was first brought and tried, and also on the appeal thereof from the decision of said court to the supreme court of the Territory of Arizona; that the said action involves an authority exercised under the statutes of the United States, to wit, the right of the United States to remove a certain inclosure and fence upon lands claimed by the United States to be public lands of the United States and by defendant claimed to be his own private property.

Affiant further states that he is personally acquainted with the property in controversy in this cause, and that, in his opinion, the value of the same is more than the sum of five thousand dollars.

162 SELIM M. FRANKLIN.

Subscribed and sworn to before me, at Tucson, A. T., April 10th, 1889.

BRYAN W. TICHENOR,
Notary Public, Pima County, A. T.

Indorsed: Filed April 26th, 1889. J. E. Walker, clerk.

Allowance of Appeal.

In the Supreme Court of the Territory of Arizona.

UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
COLIN CAMERON, Defendant and Appellant.

Upon motion of Rochester Ford, attorney for appellant in the above-entitled cause, and it appearing to the satisfaction of this court that the property in controversy in this action exceeds in value the sum of five thousand dollars, and defendant and appellant having filed a cost and supersedeas bond, which has been duly approved by this court:

It is hereby ordered that the appeal of said defendant and appellant, Colin Cameron, from the judgment and decree of this court in the above-entitled cause to the Supreme Court of the United States be, and the same hereby is, granted and allowed; and it is further ordered that, pending said appeal, execution be stayed.

Dated April 19th, 1889.

JAMES H. WRIGHT,

Chief Justice of the Supreme Court of the Ter. of Arizona.

Indorsed: Filed 4, 26, '89. J. E. Walker, clerk.

163 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, Plaintiff,
vs.
COLIN CAMERON, Defendant.
} Citation.

The Hon. James H. Wright, chief justice of the supreme court of the Territory of Arizona, to the United States of America:

Whereas Colin Cameron has lately appealed to the Supreme Court of the United States from the judgment and decree lately rendered in the supreme court of the Territory of Arizona, made in favor of you, The United States of America, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court of the United States, in the city of Washington, on the 14th day of October next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Phœnix, in the Territory of Arizona, the 19th day of Apr., in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. WRIGHT,
Chief Justice Sup. Court Arizona.

Service of a copy of the above citation acknowledged this 26th day of April, 1889, at Tucson, Pima Co., Arizona Ter.

O. T. ROUSE, *U. S. Att'y.*

Indorsed: Filed April 27, 1889. J. E. Walker, clerk.

164 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, Plaintiff and Appellee,
vs.
COLIN CAMERON, Defendant and Appellant.

Assignment of Errors on Appeal.

1st. The findings of fact as found by the court in the above-entitled cause are insufficient to support the judgment and the judgment and decision are contrary to law for the reason that it fully appears from said findings of fact that the lands enclosed by the defendant are within the claimed boundaries of the Mexican land grant, the San Rafael de la Zanja—a private land claim now pending before Congress for confirmation—and that said lands are not public lands of the United States, subject to entry and sale under the general land laws of the United States, and that said lands were enclosed by the defendant under a claim and color of title made and acquired in good faith; that it further appears from the expediente or title papers of said grant, as the same are set forth in the said findings of fact, that said grant was a perfect and complete grant
165 of the lands therein described; that the defendant is the owner of all of said land and the whole thereof, and that his predecessors were such owners at and long prior to the date of the Gadsen purchase, and that the fence or enclosure complained of is within the limits of said grant.

2nd. The judgment and decision are contrary to the findings of facts in this: that it affirmatively appears from said findings that long prior to the bringing of this action the defendant claimed an interest in and to the Mexican grant, San Rafael de la Zanja, and was let into the possession thereof by R. R. Richardson in 1880, since which time defendant has claimed the right to the possession of said grant to the exterior boundaries thereof, as the same was measured by the Mexican Government and called for in the expediente by which said grant was made; and the findings further show conclusively that the lands enclosed by the fence mentioned in this action are within said boundaries.

The findings also show that said grant has been pronounced valid by the surveyor general of this Territory and recommend- for confirmation to the extent of four square leagues; that said enclosed lands are not within the four square leagues surveyed by the surveyor general nor are they on the four square leagues cornering at the place called La Zanja, but are within the boundaries
166 called for in the expediente and within the boundaries as always claimed by the defendant and the prior claimants of said grant.

It further appears from said findings that proceedings are now pending before Congress for the confirmation of said grant, the claimants demanding that it be confirmed to its full extent, as called for in said expediente, and the surveyor general recommending that

it be confirmed only for four square leagues, and that said report has not yet been acted upon by Congress.

3rd. The court erred in permitting plaintiff to prove the nature and character of the country in the neighborhood of said fence and in permitting plaintiff to introduce evidence to show that prior to the erection of the fence described in the complaint, save for a small brush fence, the country was vacant in that neighborhood, and that there was no enclosure at the French Louis cienega.

4th. The court erred in not permitting defendant to ask the witness, R. R. Richardson, whether or not the lands embraced in the fence mentioned in the complaint were within the claimed limits of the San Rafael de la Zanja grant, as claimed by the claimants when he first knew it.

5th. The court erred in not permitting the defendant to ask the following question of the witness, R. R. Richardson: "If at that time (when witness first saw French Louis's cienega, in 1880) you knew where the claimed boundaries of the San Rafael de la Zanja Mexican land grant were?"

167 Also in not permitting defendant to ask witness whether or not the land called French Louis ranch was within the boundaries of the said San Rafael de la Zanja land grant.

6th. The court erred in not permitting the defendant to introduce the letter from the Secretary of the Interior of the United States to the U. S. surveyor general of Arizona withdrawing all the lands embraced within the claimed limits of said grant from location, sale, and entry for the purpose of showing that this was not land intended to be covered by the statute.

7th. The court erred in finding said fence to be unlawful and in finding that said fence was situate on the public land of the United States.

8th. The court erred in not sustaining defendant's motion to nonsuit the plaintiff for the reasons in said motion stated.

9th. The court erred in not sustaining defendant's motion in arrest of judgment for the reason in said motion stated.

10th. The court erred in everruling defendant's motion for a new trial of this action for the reasons in said motion mentioned.

ROCHESTER FORD,
Attorney for Colin Cameron, Appellant.

Endorsed: Filed May 8th, 1889. J. E. Walker, clerk.

168 SUPREME COURT,
Territory of Arizona, } ss:

I, J. E. Walker, clerk of the supreme court of the Territory of Arizona, do hereby certify the foregoing printed and written pages, numbered from 1 to 167, inclusive, to be a full, true, and correct transcript of record and proceedings in the cause, United States of America *vs.* Colin Cameron, therein named as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court this 18th day of May, A. D. 1889.

[Seal United States Supreme Court, Arizona.]

J. E. WALKER, *Clerk.*

169 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, Plaintiff,
vs.
COLIN CAMERON, Defendant. } Citation.

The Hon. James H. Wright, chief justice of the supreme court of the Territory of Arizona, to the United States of America:

Whereas Colin Cameron has lately appealed to the Supreme Court of the United States from the judgment and decree lately rendered in the supreme court of the Territory of Arizona, made in favor of you, The United States of America, and has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court of the United States, in the city of Washington, on the 14th day of October next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Phœnix, in the Territory of Arizona, the 19th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. WRIGHT,
Chief Justice Sup. Court, Arizona.

Service of a copy of the above citation acknowledged this 26th day of April, 1889, at Tucson, Pima county, Arizona Territory.

O. G. ROUSE, *U. S Att'y.*

170 [Endorsed:] In the Supreme Court of the United States. No. 230. United States of America *vs.* Colin Cameron. Citation. Rochester Ford, att'y of def'nt & appellant. Filed April 27th, 1889. J. E. Walker, clerk.

Endorsed on cover: No. 1158. Arizona Territory supreme court. Colin Cameron, appellant, *vs.* The United States. Filed May 31, 1889.

169 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, Plaintiff,
vs.
COLIN CAMERON, Defendant. } Citation.

The Hon. James H. Wright, chief justice of the supreme court of the Territory of Arizona, to the United States of America:

Whereas Colin Cameron has lately appealed to the Supreme Court of the United States from the judgment and decree lately rendered in the supreme court of the Territory of Arizona, made in favor of you, The United States of America, and has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court of the United States, in the city of Washington, on the 14th day of October next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand, at the city of Phœnix, in the Territory of Arizona, the 19th day of April, in the year of our Lord one thousand eight hundred and eighty-nine.

JAMES H. WRIGHT,
Chief Justice Sup. Court, Arizona.

Service of a copy of the above citation acknowledged this 26th day of April, 1889, at Tucson, Pima county, Arizona Territory.

O. G. ROUSE, *U. S Att'y.*

170 [Endorsed:] In the Supreme Court of the United States. No. 230. United States of America *vs.* Colin Cameron. Citation. Rochester Ford, att'y of def'nt & appellant. Filed April 27th, 1889. J. E. Walker, clerk.

Endorsed on cover: No. 1158. Arizona Territory supreme court. Colin Cameron, appellant, *vs.* The United States. Filed May 31, 1889.

146 U.S. 533 ?

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

COLIN CAMERON, *Appellant*,

vs.

THE UNITED STATES.

No. 365.

APPEAL FROM THE SUPREME COURT OF ARIZONA TERRITORY.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF APPELLANT.

ROCHESTER FORD,
Of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1891.

COLIN CAMERON, *Appellant*,

vs.

THE UNITED STATES.

No. 365.

APPEAL FROM THE SUPREME COURT OF ARIZONA TERRITORY.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF APPELLANT.

STATEMENT OF THE CASE.

This is an action against defendant charging him with having inclosed, and with maintaining the inclosure of, about 800 acres of public agricultural lands in Pima County, Arizona Territory. The petition alleges (record, p. 1), that said lands belong to the United States and are subject to entry at the proper land office, and that defendant has inclosed the said

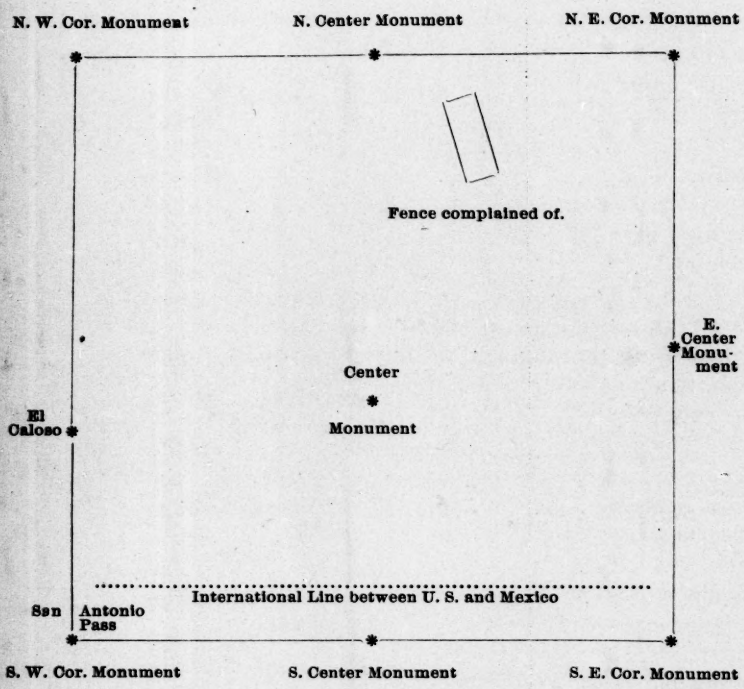
lands without any title, or claim or color of title, acquired in good faith, thereto, and without having first made application to acquire title thereto according to law.

The suit was brought under the act of Congress approved February 25, 1885 (23 Stats. 321), entitled "An act to prevent unlawful occupancy of the public lands." By section 1 of this act it is provided that

"All inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected or constructed by any person * * * to any of which land included within the inclosure the person * * * making or constructing the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office under the general land laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use or occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited."

Section 2 enacts that United States district attorneys on complaints made are to institute civil suits.

Defendant filed a general denial and also an amended answer (record, pp. 2–5), in which he alleged that on May 15, 1825, the Mexican Government granted to Ramon Romero and others a certain tract of land known as the Rancho San Rafael de la Zanja, according to the monuments and boundaries called for and described in the expediente thereof, and that the said rancho was surveyed by metes and bounds by the Mexican authorities. Defendant alleged, and it was


N. W. Cor. Monument
N. Center Monument
N. E. Cor. Monument
Fence complained of.
E. Center Monument
Center
Monument
El Caloso
International Line between U. S. and Mexico
San Antonio Pass
S. W. Cor. Monument
S. Center Monument
S. E. Cor. Monument

so stipulated (record, p. 60), that he had succeeded before the commencement of this action to all the right, title or interest of Ramon Romero or his heirs in said grant as the same was granted by the Mexican Government.

Defendant alleged, further, that the lands claimed to have been inclosed were within the boundaries of said grant; that he had filed his claim under the acts of Congress of July 22, 1854, and July 15, 1870, asking for the confirmation of said grant to the boundaries thereof, and that said application was pending before Congress, and that all the lands within the boundaries of said grant, including the lands claimed to have been inclosed, had been withdrawn from location and entry under the laws of the United States because of defendant's claim thereto; that said grant had been reported on by the Surveyor General of Arizona, who reported the same valid, and recommended confirmation of the same to the extent of four square leagues only.

The map opposite shows the boundaries of the grant as measured, monumented and described in the expediente, and as surveyed by the Mexican authorities, and as located by the findings of fact, and shows, also, the location of the fence complained of. The findings of fact show (record, p. 9), that before the commencement of this action and before the erection of the fence complained of, the claimants of said grant had filed with the Surveyor General of Arizona, under the provisions of the act of July 15, 1870, their petition to have said grant confirmed for all of the lands measured and called for in said expediente and to the boundaries thereof, and that the grantees of said grant and their successors in interest have always claimed that the said grant conveyed all of the lands recited as measured in said expediente to the exterior

boundaries measured and described in said expediente.

This appears fully from the third and fourth findings of fact, which are as follows (record, pp. 28–29):

FINDINGS OF FACT 3 AND 4.

That the said fence so maintained by the defendant is within the exterior boundaries, as said boundaries are recited as measured in said expediente, and as claimed in the petition filed before the Surveyor General; that the said fence is a mile and a quarter south of the northern boundary and four miles west of the eastern boundary of lands recited as measured in said expediente and as claimed in said petition, but that it is outside of the four square leagues so as aforesaid caused to be measured by the said Surveyor General, and that it is outside of the four square leagues cornering on the place called La Zanja, the starting-point of measurements recited in said expediente.

That Colin Cameron, the defendant, had succeeded before the commencement of this action, or the erection of said fence, to all the right, title and interest which Ramon Romero ever had in or to said grant, and before and at the commencement of this action was, and ever since has been, in possession of all buildings on the said four square leagues so as aforesaid caused to be surveyed by said Surveyor General, and is now claiming and has always claimed the title to and possession of all the land embraced within the exterior boundaries as measured in said expediente, and that he has occupied and used all of said land within the exterior boundaries by grazing of cattle upon said lands, claiming title to said land, and that he now has all of the right, title and interest which Ramon Romero ever had or held in or to said alleged grant.

The findings of fact of the trial court were adopted by the Supreme Court of Arizona as the findings of that court (record, p. 75).

A concise statement of the case is as follows:

The Mexican Government made a grant in which a certain tract of land was surveyed, measured and monumented. No question is raised as to the identity of this tract or as to the location of the monuments and boundaries of the original survey as called for and described in the title-papers. The grantees presented their petition or claim before the Surveyor General under the acts of July 22, 1854, and July 15, 1870, which petition described the tract of land according to the measurements of the expediente, and prayed for confirmation of said tract. The Surveyor General reported that the grant was valid and that the claimants asked for confirmation of all the lands within the boundaries, but recommended that the claim be restricted to four square leagues. By order of Secretary of the Interior Teller (record, p. 53) pending the final action of Congress on the claim all the lands claimed by defendant and embraced within the monuments of possession as shown by the expediente were reserved from sale or other disposal because of defendant's claim to all of such lands. While this order was in force and while the claim was pending before Congress, part of such lands so claimed and reserved were inclosed by defendant.

From the above it is apparent that the main question in this case is: Can the land so inclosed be considered "public lands of the United States" to which defendant has "no claim or color of title made or acquired in good faith" within the meaning of the act under which this suit was brought?

ASSIGNMENT OF ERRORS ON APPEAL.

1st. The findings of fact as found by the court in the above-entitled cause are insufficient to support the judgment and the judgment and decision are contrary to law for the reason that it fully appears from

said findings of fact that the lands inclosed by the defendant are within the claimed boundaries of the Mexican land grant, the San Rafael de la Zanja—a private land claim now pending before Congress for confirmation—and that said lands are not public lands of the United States, subject to entry and sale under the general land laws of the United States, and that said lands were inclosed by the defendant under a claim and color of title made and acquired in good faith; that it further appears from the expediente or title-papers of said grant, as the same are set forth in the said findings of fact, that said grant was a perfect and complete grant of the lands therein described; that the defendant is the owner of all of said land and the whole thereof, and that his predecessors were such owners at and long prior to the date of the Gadsden purchase, and that the fence or inclosure complained of is within the limits of said grant.

2nd. The judgment and decision are contrary to the findings of fact in this: that it affirmatively appears from said findings that long prior to the bringing of this action the defendant claimed an interest in and to the Mexican grant, San Rafael de la Zanja, and was let into the possession thereof by R. R. Richardson in 1880, since which time defendant has claimed the right to the possession of said grant to the exterior boundaries thereof, as the same was measured by the Mexican Government, and called for in the expediente by which said grant was made. And the findings further show conclusively that the lands inclosed by the fence mentioned in this action are within said boundaries.

The findings also show that said grant has been pronounced valid by the Surveyor General of this Territory, and recommended for confirmation to the extent of four square leagues; that said inclosed lands are not within the four square leagues surveyed by the Surveyor General, nor are they on the four square leagues cornering at the place called la Zanja, but are within the boundaries called for in the expediente, and within the boundaries as always claimed by the defendant and the prior claimants of said grant.

It further appears from said findings that proceedings are now pending before Congress for the confirmation of said grant, the claimants demanding that it be confirmed to its full extent, as called for in said expediente, and the Surveyor General recommending that it be confirmed only for four square leagues, and that said report has not yet been acted upon by Congress.

3rd. The court erred in permitting plaintiff to prove the nature and character of the country in the neighborhood of said fence, and in permitting plaintiff to introduce evidence to show that prior to the erection of the fence described in the complaint, save for a small brush fence, the country was vacant in that neighborhood, and that there was no inclosure at the French Louis cienega.

4th. The court erred in not permitting defendant to ask the witness, R. R. Richardson, whether or not the lands embraced in the fence mentioned in the complaint were within the claimed limits of the San Rafael de la Zanja grant, as claimed by the claimants when he first knew it.

5th. The court erred in not permitting the defendant to ask the following question of the witness, R. R. Richardson: "If at that time (when witness first saw French Louis' cienega in 1880) you knew where the claimed boundaries of the San Rafael de la Zanja Mexican land grant were?"

Also in not permitting defendant to ask witness whether or not the land called French Louis Ranch was within the boundaries of the San Rafael de la Zanja land grant.

6th. The court erred in not permitting defendant to introduce the letter from the Secretary of the Interior of the United States to the U. S. Surveyor General of Arizona withdrawing all the lands embraced within the claimed limits of said grant from location, sale and entry for the purpose of showing that this was not land intended to be covered by the statute.

7th. The court erred in finding said fence to be unlawful and in finding that said fence was situate on the public lands of the United States.

8th. The court erred in not sustaining defendant's motion to non-suit the plaintiff for the reasons in said motion stated.

9th. The court erred in not sustaining defendant's motion in arrest of judgment, for the reason in said motion stated.

10th. The court erred in overruling defendant's motion for a new trial of this action, for the reasons in said motion mentioned.

POINTS AND AUTHORITIES.

I.

The cause of action being grounded on the allegation of the government that to the lands inclosed defendant had "no claim or color of title made or acquired in good faith," it was incumbent on the plaintiff to prove this negative allegation, and having failed to do so the motion for a non-suit should have been sustained.

1 Greenl., Evid., Sec. 78.
Best, Evid., (Amer. Ed.), Sec. 270.
Colorado Coal & Iron Co. *et al.* v. U. S., 123 U. S. 307.

II.

The evidence and findings of fact show that to the lands inclosed defendant had at the time of the inclosure and now has "claim and color of title made and acquired in good faith," and that therefore he comes within the saving clause of the act.

See third and fourth findings of fact, record, pp. 28, 29.
See act of February 25, 1885 (*supra*).
Newhall v. Sanger, 92 U. S., 764.
Doolan v. Carr, 125 U. S., 618.
U. S. v. McLaughlin, 127 U. S., 428.
U. S. v. Felderwald, 36 Fed. Rep., 490.
U. S. v. Brandenstein *et al.*, 32 Fed. Rep., 738.
U. S. v. Osborn, 44 Fed. Rep., 29.

III.

The lands inclosed are not "public lands," because they were and are not subject to sale or other disposal under general laws, but, before the inclosure, had been reserved from sale because of the claim filed to them as private property. The phrase "public lands" is limited to lands open to settlement and entry, and is so used in the act of February 25, 1885.

Newhall v. Sanger, *supra*.
U. S. v. Elliott, 26 Pac. Rep., 1117.
Spaulding v. Martin, 11 Wisc., 274.
State v. Delesdeiner, 7 Tex., 108.
Wilcox v. Jackson, 13 Pet., 266.
Acts of July 22, 1854, and July 15, 1870, and instructions issued thereunder.

IV.

The language of the grant and the delivery of juridicial possession show that all the lands were sold as measured, and that the grant conveys the entire tract.

See translation of expediente, record, pp. 37-44.
U. S. v. Pico, 5 Wall., 538.
Malarin v. U. S., 1 Wall., 282.
U. S. v. Pache Co., 22 How., 225.

ARGUMENT.

I.

As to the first point in the brief, which is that the motion for a non-suit should have been sustained, and which takes up the third and eighth assignments of error, the record shows (pp. 30–36) that defendant admitted that he had erected and was maintaining a fence inclosing about 800 acres, but denied that the lands inclosed were public lands. Defendant admitted, also, that to the lands inclosed he had no claim of ownership under any law of the United States, and had not occupied said lands with a view of entering them under any law of the United States applicable to the disposal of the lands of the United States. The government proved by the witness *T. L. Rice* that he had known the country where the fence complained of is, some four years; that when he first knew the country there was, where the fence complained of is, a brush fence inclosing about twenty-five acres; that the fence complained of takes in a great deal more land than the brush fence did, and that, independent of what was inclosed by the brush fence, the land inclosed by the fence complained of had never been occupied by any one, so far as witness knew.

To all this testimony defendant duly excepted as being incompetent and immaterial. The government rested, and defendant moved for a non-suit, which motion was overruled, and defendant duly excepted.

It is submitted, first, that the government failed to prove that the lands inclosed were "lands of the United States," and "public lands," or lands open to settlement and entry, as that phrase is manifestly used in the act of February 25, 1885. Having made the specific allegation in the complaint that the lands

inclosed were open to settlement and entry under the general laws of the United States, this became such an allegation as, under the laws of pleading, had to be proved as laid. The possession of defendant was *prima facie* evidence of title in fee simple (1 Greenleaf, Evid., Sec. 109), and no evidence was offered to overthrow this presumption.

Second. The act of February 25, 1885, does not make all inclosures of public lands unlawful. The act applies only to inclosures of public lands to which the party making the inclosure "had no claim or color of title, made or acquired in good faith." A complaint under this act which failed to allege that defendant had "no claim or color of title," etc., would be demurrable (U. S. v. Felderward, *supra*). As said in U. S. v. Osborn, *supra*, "by the plain language of the act one of the essentials of an unlawful occupancy is that at the time of its inception there should have been no claim made to the land in good faith, and no color of title acquired in good faith." Congress having expressed itself and made the offence depend upon the fact of the person's having had no claim or color of title to the land at the time the inclosure was made, such fact becomes a material element in the offence. Being a material element, it must be alleged, and, it is submitted, it must be proved. There was not one word of proof as to this, and the presumption being that the possession of defendant was under a claim of right, we think the government utterly failed to make its case.

II.

A discussion of the second point in this brief embraces the first and second assignments of error. The conclusion of law (record, p. 29) from the findings of fact is that "the court adjudges and decrees

that the place where the inclosure was made was public lands, and that the inclosure was therefore unlawful." For the reasons above stated, we submit that this conclusion of law cannot support the decree that the inclosure was unlawful, because it fails to appear from the decree that defendant had "no claim or color of title," etc., to the lands inclosed, which fact is a material element. This conclusion of law and decree state no offence under the statute.

A controlling question in this case then is, Do the findings of fact show not only that "the place where the inclosure was made was public lands," but, in addition, public lands to which defendant had "no claim or color of title made or acquired in good faith?"

The plain language of the findings of fact (findings three and four, *supra*), shows that defendant had and has such a claim and color of title. The findings say in so many words that the land inclosed is "within the boundaries claimed in the petition filed before the Surveyor General," and that defendant "is now claiming and has always claimed the title to and possession of" such land. Why, then, it will be asked, was not judgment rendered for defendant? The answer is that the lower court, while finding that defendant had an actual claim made and color of title acquired in good faith, in effect inserts in the act of February 25, 1885, the word "lawful," and then proceeds to hold that defendant's claim and color of title are not "lawful." The court says in its opinion (record, p. 68): "What is the 'claim?' Is it the petition of the claimant? If so, this fence is within what he claims." That is to say, to make perfectly clear, if possible, the error which we think underlies the reasoning of the lower court, that court finds the fact to be, and so concedes in the extract

just quoted from the opinion, that defendant has a claim and color of title made and acquired in good faith to the land inclosed; that this claim had been made long before the present suit was brought, and was at the time of the suit pending before Congress. The court then undertakes to pass on the merits of the claim of defendant by construing the title-papers on which the claim is based, and decides that these title-papers do not support the claim to the full extent made, but do support it to a smaller extent. This adjudication on the merits of the claim the court substitutes for the actual claim itself. It thus, as we have said, inserts in the act of February 25, 1885, the word "lawful" before claim, and practically says: "While it is true that you have an actual claim made in good faith to the land inclosed, we do not consider that your claim will 'lawfully' embrace the land inclosed, and we therefore hold that your claim is what we think it ought to be."

This decision comes squarely within the case of Newhall v. Sanger, *supra*, where this court said that the word "lawful" could not be inserted in a statute to change its meaning, and we submit that it cannot be so inserted in the act of February 25. That act was not intended to try the validity of claims. On the contrary, it clearly excepts from its operation land to which there is any actual claim or color of title, provided this is made or acquired in good faith. The validity of the claim is to be determined, not by the summary proceedings of the act of February 25, but in an appropriate action to try such a question.

What the claim of defendant is is set out in plain terms in the record (p. 9), and is as follows, leaving out what does not bear on the question under consideration:

PETITION.

BEFORE THE SURVEYOR GENERAL OF THE UNITED STATES IN THE TERRITORY OF ARIZONA:

In the matter of the petition of Francisco Romero and others for confirmation of grant for the place called San Rafael de la Sanja (Zanja).

Now come Lindley & Corella, attorneys for Francisco Romero, Pedro Romero, Inocencio Romero, Juan de Ortega, Dolores des and for the claimants as heirs of the *parsioneros* (parcioneros) and show:

I. That in the year 1822 the Spanish and Mexican governments, through their proper officers, sold for $1,297–6 reales and 9 granos at public sale, to Ramon Romero and his parcioneros a tract of land on the head waters of the Santa Cruz river known as the "San Rafael de la Zanja," containing sixteen square leagues mostly situated in that portion of the presidio of Santa Cruz and of the State of Sonora, which is now included in the Territory of Arizona. The land lies on the boundary line between Mexico and the United States about nine-tenths in the latter and one-tenth in the former, and is more particularly described in the expediente or grant for the same executed and delivered in 1825 to said Romero, a true copy of which is attached hereto, marked exhibit "A" and made a part of this petition. A true translation thereof, marked exhibit "B," is also annexed hereto and made a part of this petition.

The expediente is duly registered and recorded in Mexico, and those entitled to take and hold the land under the grant were placed in judicial possession thereof, and they and their heirs have ever since had possesion thereof even when harassed by hostile Indians who at different periods overran and devastated the surrounding country.

II. The tract of land is described as follows: Commencing in the centre of the tract at a place called at the time the grant was made "San Rafael," running thence north two hundred cordels, being two leagues, to an oak tree marked with a cross cut thereon

and a stone monument at the tree; thence east two hundred cordeles, being two leagues, to the N. E. corner marked by a heap of stones: thence south four hundred cordeles, being four leagues, to the South-east corner, marked also by a heap of stones, thence west four hundred cordeles, being four leagues, to the S. W. corner, being on the Puerta de San Antonio where there are two little hills; thence north four hundred cordeles, being four leagues, to a point on the Plomosa mountain; thence east two hundred cordeles, being two leagues, to the place of beginning. The centres of the four exterior lines of the square are marked also by monuments of stone placed as were the other monuments mentioned, at the time the land was measured by the Mexican Government. The tract is also bounded on the south by the pueblo lands of Santa Cruz.

III. That the words "cuatro sitios" used in the expediente, by the customs, laws and usages of the Mexican government at that time mean four leagues square, as distinctly marked by the survey and monuments then made and established, as appears by said expediente, and the judicial possession, occupation and prescription of said tract has always been co-extensive with said survey, and the Mexican government down to the time of the cession of Arizona to the United States, has accepted and recognized the survey mentioned in the expediente as fixing the bounds of the tract granted and has, by said survey and its uniform recognition, the expediente and the large sum paid for said tract, given a practical construction of said words "cuatro sitios" to be four leagues square.

IV. That all the proceedings in connection with said title from and including the presentation of the petition to and including the final act of grant were regular and were duly authorized by law, and the respective officers named in the expediente were duly authorized to perform the functions which they respectively purport to have performed in said expediente, and all facts stated in said expediente are true.

The Mexican Government under the laws of the

State of Sonora and Sinaloa, and not under the colonization laws, had measured, appraised, surveyed, monumented and bounded a certain tract of land. The undisputed testimony shows (record, pp. 54-60) that the monuments and boundaries established by the original survey are clear and unmistakable, and are now located on the ground at the places described in the title-papers. Only one survey was made, namely, of the entire tract, and, as heretofore stated, there are no "exterior" or "out" boundaries as distinguished from other boundaries The title-papers show, as claimants allege, that everything was done necessary to convey a perfect title in fee. The claimants in their petition before the Surveyor General under the act of July 15, 1870, laid claim to this entire tract, describing it by the metes and bounds given in the title-papers, and alleging that the whole of said tract had been sold and juridical possession thereof given to them. The title-papers speak in some places of the tract of land measured and sold as being "quatro sitios de ganado mayor," or four square leagues, as the Spanish words generally mean, whereas the quantity actually embraced within the measurements is much more than four square leagues. There was no measurement made of four square leagues, but only of the tract claimed by defendant. Now, the point on which the Supreme Court of Arizona decided this case is that although the claimants claimed that the whole tract as measured had been sold and juridical possession of the whole of said tract delivered to them, and although they asserted title to the whole of said tract, asking Congress to confirm the same to them, and although this petition was then pending before Congress—although this was all conceded—the Supreme Court of Arizona sits in judgment on the merits or lawfulness of the claim, holds that it is law-

ful for only a small quantity of the land which had been measured and was actually claimed, and then holds that the "claim," as this word is used in the act of February 25, must be taken to mean what the court thinks the claim ought to be.

At the risk of redundancy or repetition, we urge this point upon the court. If the grantees believed that their grant was one by boundaries and that it conveyed all the land within such boundaries, it was incumbent on them to assert their position and state clearly what their claim was. Believing this, they in good faith asserted their claim for the entire tract. Their claim was for all the land, just as much for the land inclosed as for any other embraced within the boundaries. An adjudication of this claim may affirm it to the full extent claimed, or for a part or for none. But we say that the claim or demand is entirely different from the adjudication of such demand, and that when this suit was brought the claim was, and still is, for the whole tract. As the part inclosed is within this tract, it was and is covered by the "claim of defendant made in good faith." Therefore the statute does not apply to such land, and this case should be reversed as not coming within the statute.

The question of the lower court, What is the "claim" in this case? can be easily answered, if the foregoing does not do so. The word "claim" is one in common use, and has been defined, also, by the courts. Worcester says that a "claim is a demand as of right; a challenge of ownership; as, 'To lay claim to anything.'" Webster defines it as a "demand of a right or supposed right; the thing claimed or demanded." This court in Prigg v. Pennsylvania, 16 Pet., 539, has defined a claim to be "in a just, juridical sense, a demand of some matter as of right, made by one person upon another, to do or forbear to do

some act or thing as a matter of duty." It is "the assertion, demand, or challenge of something as a right, or the thing thus demanded or challenged." (Fordyce v. Godman, 20 Ohio St., 14.) A claim is "something asked for or demanded on the one hand, and not admitted or allowed on the other." (Dowell v. Cardwell, 4 Saw., 288.)

In view of the above we submit without further argument that the claim was the demand which was asserted, and this demand was of ownership of the entire tract, which includes, as the findings of fact show, the land inclosed. If claimants believed that they owned the entire tract, it was obligatory on them to assert their claim to it. To say that the claim in this case is synonymous with a subsequent adjudication of a court is inserting the word "lawful" in the statute, and confusing "claim" with judgment. If claimants had asserted ownership only to the south half of the tract, that would have been their claim. If they had asked for the northeast quarter of the tract, that also would have been their claim. But, as repeatedly stated herein, they believed that they owned the entire tract, and in good faith asserted their claim thereto, and this claim was pending before Congress and undetermined when this suit was brought.

If the defendant has "claim or color of title," etc., to the land inclosed, as this record, we submit, shows he has, can it make any difference in the decision of this case what the supposed merits of his claim are? His claim may, years hence, be established to the full extent of his demand, or to a smaller extent, or rejected entirely, without changing the fact that at the time of the inclosure defendant had "claim and color of title made or acquired in good faith," and hence has not violated the statute. It would seem that the language used by this court in

Doolan v. Carr, *supra*, is by the clearest analogy decisive of the present question. In speaking of lands in California which were reserved because they were claimed to have been granted by the preceding government, this court said: "Those Mexican claims were often described, or attempted to be described, by specific boundaries. * * To the extent of the claim when the grant was for the land with specific boundaries * * they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of right under a grant by the Mexican Government, which was yet undetermined, and to which, therefore, the phrase 'public lands' could not attach." So, in the present case, to state again the position of defendant, the fact that he has a claim made in good faith to the lands inclosed does not depend upon the validity of his claim as asserted or its final establishment. There was at the time this suit was brought against defendant his claim of right under a grant by the Mexican Government, which was yet undetermined. His claim in good faith is that the grant is one by specific boundaries, and his claim was for the whole tract, including the land fenced. As said by this court in Newhall v. Sanger, *supra*, in speaking of Spanish and Mexican claims in California, "Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication." So in the present case, the claim for the entire tract was not "prejudged to be unlawful," but was submitted to Congress for adjudication. Pending its adjudication, which was its condition at the time this suit was brought, none of the tract could be considered "public lands to which defendant had no claim."

To put the point in still another light, we ask,

Before the court undertook to adjudicate this claim, what was the claim which it acted on? The court answers this question in the part of its opinion which has been quoted, by saying that if the "claim" is the petition of the claimant, this fence is within what he claims. Therefore, what the court considered and adjudicated on, was this claim for the whole tract. This claim was necessarily in existence at the time the suit was brought, or there would have been no occasion for the court to discuss its legality. But if there was at the time of the inclosure, a "claim made in good faith," etc., it is immaterial in this case whether, after the inclosure, the court undertakes to construe the claim, because the act of February 25 excepts the land if there was such claim at the time of the inclosure. It is perfectly clear that one may in good faith assert a claim which may afterwards be decided against him.

We sum up the discussion on this point by saying that if a person has "claim or color of title made or acquired in good faith" to the lands inclosed, he does not come within the provisions of the statute. The findings of fact show that defendant has such claim and color of title. He therefore does not come within the act, and this case should be reversed.

III.

The third point in this brief involves the sixth and seventh assignments of error. This point is that the record shows that the lands inclosed were not "public lands," as those words are used in the act under which this suit was brought. In Newhall v. Sanger, *supra*, this court by Davis, J., said: "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal

under general laws." This decision was rendered almost ten years before the act of February 25 was passed. Not only is it the presumption that Congress used the words "public lands" in that act in accordance with the judicial construction which had been given them, but the act itself shows that the "public lands" therein referred to are "public lands subject to settlement or entry under the public land laws," and are lands "subject to entry at the proper land office under the general laws of the United States."

We think this record clearly shows that the lands inclosed were never "public lands," but that from the moment the claim was filed to them they became reserved by law from "sale or other disposal by the government," for the reason that they were claimed as private property under the treaty of 1853, commonly known as the Gadsden purchase, and under the act of July 22, 1854. The court below states in its opinion that "it was not intended that lands (in Arizona Territory, claimed as private property under the treaty) should be reserved," but we believe a very short examination of the legislation and rulings on this subject will show the error of the lower court.

By act of September 9, 1850 (9 Stats., 446), the Territory of New Mexico was organized, and included all of the present Territory of New Mexico and that portion of Arizona north of the Gila River, which was acquired under the treaty of Guadalupe Hidalgo.

By act of July 22, 1854 (10 Stats., 308), all of New Mexico as then existing was made one surveying district, and a Surveyor General was provided therefor. The eighth section of that act provided that the Surveyor General should make a report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, which report should be laid before Congress

for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants; and the section concludes "and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the Government, and shall not be subject to the donations granted by the previous provisions of this act."

The act of August 4, 1854 (10 Stats., 575), provided that "the territory acquired under the late treaty with Mexico, commonly known as the Gadsden treaty, be, and the same is hereby, incorporated with the Territory of New Mexico, subject to all the laws of the said last-named Territory."

Therefore at this time the Territory of New Mexico included all the present Territories of New Mexico and Arizona. It was all within the surveying district of New Mexico, and the lands now in Arizona were unquestionably then subject to all the provisions of the act of 1854 above quoted.

The Territory of Arizona was created with its present limits by the act of February 25, 1863 (12 Stats., 664), but it remained in the surveying district of New Mexico, and the Surveyor General of New Mexico retained jurisdiction over it, until it was created into a separate surveying district by the act of July 11, 1870 (16 Stats., 230), and the office of Surveyor General for the new district created. By this act the Surveyor General was charged with no new duties in connection with grants made by the former government; but in the "Sundry Civil" appropriation act of July 15, 1870 (16 Stats., 291), the following enactment was made:

"For surveying the public lands in Arizona, at rates not exceeding fifteen dollars per lineal mile for standard lines, twelve dollars for township, and ten dollars for section lines, ten thousand dollars: *Pro-*

vided, That it shall be the duty of the Surveyor General of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory under the laws, usages, and customs of Spain and Mexico; and for this purpose he shall have all the powers conferred, and shall perform all the duties enjoined upon the Surveyor General of New Mexico by the eighth section of an act entitled 'An act to establish the offices of Surveyors General of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers, and for other purposes,' approved July twenty-second, eighteen hundred and fifty-four, and his report shall be laid before Congress for such action thereon as shall be deemed just and proper."

It does not at all follow, we submit, that no reservation was intended of lands in Arizona simply because the clause creating such reservation in the act of July 22, 1854, does not appear in the statute above quoted. Both of these acts required the Surveyor General to report to Congress each claim presented to him, and Congress reserved to itself final action on such claims. It cannot be supposed that Congress intended that lands in New Mexico which were covered by such claims should be reserved pending its action, while lands in Arizona in precisely the same situation should be subject to sale at the very time that they were claimed as private property. The act of 1854 impressed the condition of reservation upon all the lands for which claims should be filed, and that condition attached to all the lands then in New Mexico, which at that time included all of what is now Arizona. The act of 1870 merely specified the powers and duties of the new Surveyor General, but did not undertake to repeat the condition impressed upon the land claimed, for that condition had existed ever since the act of 1854, and was not changed by the political subdivision

of the Territory, nor by its division into two districts for surveying purposes.

Furthermore, the contemporaneous and uniform executive construction given to these statutes shows that the lands covered by these claims in Arizona were regarded as reserved by virtue of said acts. Each act specifies that the examination of these claims and their presentation to Congress by the Surveyor General shall be "under such instructions as may be given by the Secretary of the Interior." Such instructions, therefore, have the force and effect of statutes. They become a part of the law, and any questions which may arise upon the face of the acts of 1854 and 1870 must be taken as construed by those instructions. On August 25, 1854, immediately after the passage of the act of 1854, the Secretary gave full instructions to the Surveyor General as to his duties under the eighth section of the act, and the manner of performing them. These instructions will be found in the annual report of the Commissioner of the General Land Office for 1854, p. 9. They were repeated after the act of 1870 to the Surveyor General of Arizona. Among the instructions is the following:

"The duty which this enactment devolves upon the Surveyor General is highly important and responsible. He has it in charge to prepare a faithful report of all the land titles in Arizona which had their origin before the United States succeeded to the sovereignty of the country, and the law contemplates such a report as will enable Congress to make a just and proper discrimination between such as are *bona fide* and should be confirmed, and such as are fraudulent or otherwise destitute of merit and ought to be rejected."

* * * * * *

"You will also require of every claimant an authenticated plat of survey, if a survey has been executed, or other evidence, showing the precise locality and extent of the tract claimed.

"*This is indispensable, in order to avoid any doubt hereafter in reserving from sale, as contemplated by law, the particular tract or parcel of land for which a claim may be duly filed, or in consummating the title to the same hereafter in the event of a final confirmation.*"

"The effect of this will be not only to save claimants from embarrassment and difficulties inseparable from the presentation and adjudication of claims of indefinite limits, but will promote the welfare of the country generally by furnishing the Surveyor General with evidence of what is claimed as private property, under treaty and the act of July 22, 1854; thus enabling him to ascertain what is undisputed public land, and to proceed with the public surveys accordingly, without awaiting the final action of Congress upon the subject."

Certainly there can be no doubt as to the construction given to the law by the Secretary in these instructions, or as to what he directed should be done. It was that all lands in Arizona for which claims should be filed with the Surveyor General were to be *reserved* until the final action of Congress on such claims.

But still furthermore on this point. The tract of land claimed by defendant—and it will always be understood that the inclosure complained of is within this tract—had, before this suit was brought, been specifically reserved from sale by order of two Secretaries of the Interior for the very reason that it was claimed by defendant as his private property under the treaty and the acts of 1854 and 1870, which claim was pending before Congress. Defendant offered in evidence the letter and ruling of Secretary Teller (record, pp. 53-54), ordering the reservation of all the land claimed by defendant. The court refused to allow this order to go in evidence, and defendant assigns this ruling of the court as error. This order of

the Secretary is as follows, and we submit that it shows beyond any question that the land had been reserved before the inclosure:

DEPARTMENT OF THE INTERIOR.
WASHINGTON, March 3, 1885.

The Commissioner of the General Land Office:

SIR:—I have considered the appeal of Colin Cameron from your decision of December 4, 1884, declining to authorize a preliminary survey of the "Rancho San Rafael de la Zanja," in Arizona, to the extent of sixteen square leagues, a preliminary survey thereof having once already been made covering four square leagues only, and reported to Congress by Surveyor General Wasson's report of April 28, 1880, recommending confirmation to the latter extent only—transmitted to that body on December 9, 1880.

This claim has heretofore been the subject of departmental consideration, in view of pending action by Congress, your recommendation of April 11, 1882, for confirmation by the larger boundaries having been overruled by my predecessor's letter of April 28, 1882, addressed to Hon. R. Pacheco, Chairman of the House Committee on Private Land Claims, wherein he adhered to the original recommendation of the Surveyor General.

In view of the fact of such pendency before Congress and of the departmental opinion aforesaid, you decline to authorize the survey now applied for, holding that the executive jurisdiction of the subject matter is concluded.

It is true a recommendation has been made for a specific confirmation by surveyed boundaries, and if that were the conceded extent of the claim, and the question were upon title alone, there could be no private claim outside that survey. But the extent is the only disputed matter before Congress—except, it may be, the merely incidental one of ascertaining the names and whereabouts of a portion of the grantees—as the validity of the grant is not drawn in question, and it is admitted, so far as the opinions go, that so much, at least, belongs to the same. Now, there

being a claim pending in Congress—which was also presented to the Surveyor General and decided adversely by him—to have a confirmation by the metes and bounds set up by the claimants, it is proper to inquire what lands are reserved by law. The statute defines them. "Until the final action by Congress on such claims, all lands covered thereby shall be reserved from sale or disposal by the Government, etc." That is, all claims reported upon by him, and in which he shall have given "his decision as to the validity or invalidity"—under his authority to "ascertain the origin, nature, character and extent." There being an issue here taken as to the validity of this claim for an extent greater than has been awarded by the Surveyor General, the duty to reserve the lands is clearly incumbent on this Department, and if that can best be done by a preliminary survey to fix their identity, the claimants paying the expense, I am of the opinion it is lawful, and should be allowed.

Of course nothing in such proceeding can be construed as a recognition of the validity of the claim, that being a matter for expression by authoritative opinion, when called upon by Congress for recommendation. The survey should simply show and exactly define the claimed boundaries, by the monuments of possession, leaving unaffected the final adjudication committed by law to Congress and not to this Department.

With this modification of your action I return the papers submitted by your letter of 4th ultimo.

Very respectfully,

[SIGNED] H. M. TELLER,

Secretary.

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Here the Secretary recognizes the fact that defendant's claim was and always had been for the entire tract as defined by the metes and bounds. The Secretary clearly states the law to be that all the land covered by this claim is reserved by law till the claim is adjudicated, and he therefore orders, in pursuance of law, that all the land within the claimed boundaries be reserved.

As to the authority of the Secretary to make such an order, and as to its expediency, there can be no question. This court has said in Shepley v. Cowan, 91 U. S., 336: "The general rule of the land department is, and from the commencement of the Government has been, to hold as exempted from sale or pre-emption lands which might in the execution of the laws of Congress fall within grants to others." It was in accordance with this general rule that the Secretary withheld from sale the land which defendant claimed as his private property. So that even if these lands were not reserved by virtue of the acts of 1854 and 1870, and the instructions issued thereunder, they were beyond any question reserved by this order of the Secretary, for that was the exact purpose of the order, namely, to reserve from sale all the lands within the claimed boundaries of defendant.

This ruling was considered and affirmed by Secretary Lamar, whose decision is reported in 4 Land Decisions, 482. The claim, he says, under the act of 1854 "embraces the land which the claimant in good faith alleges to be his."

Now we submit that this land which was inclosed was reserved from sale or other disposal by the Government by virtue of the acts of 1854 and 1870 from the moment the claim to such land was filed with the Surveyor General under these acts. Moreover, it has been expressly reserved from sale by orders of two Secretaries of the Interior. It cannot possibly be considered "public lands," for the very reason that it was a Mexican grant under investigation by Congress and therefore reserved from sale. The attention of the court is particularly invited to the fact that this land had been by proper authority, the Secretary of the Interior, reserved from sale because of the pending claim of defendant thereto; but in the face of

this fact the court below holds that defendant has no claim to the land. This astonishing conclusion is arrived at, as heretofore indicated, by ignoring the actual and subsisting claim, and substituting therefor what the court thinks defendant ought to have claimed. While the land is admittedly covered by the claim made by defendant in good faith, it is not covered by what the court thinks the claim ought to have been.

IV.

This case has been argued so far on the theory that the subsisting claim of defendant made in good faith before the inclosure was erected brings him within the exceptions of the act, and that it is not necessary nor permissible in this case to inquire into the merits or lawfulness of his claim. This is expressly so held in United States v. Osborn, *supra*, which was a suit brought under the same section of the act of February 25. There defendant had entered upon some land relying upon a promise of a railroad company that it would, after perfecting its title, sell him the land. The court said that as "the defendant had an actual claim made in good faith on his part, at the time of his entry thereon, the mere statement of these facts in the case ends it." Whether the lands inclosed were properly within the grant to the railroad company might be decided either way, the court said, without affecting the fact that defendant entered under both a claim and color of title made and acquired in good faith.

So we think that for the above reasons this case must be decided for defendant, irrespective of how his claim is finally adjudicated. The lower court says in its opinion: "But what is the 'claim?' Is it the petition of the claimant? If so, this fence is within

what he claims. If the petition mark the limits of the claim, then we are led to the absurd conclusion that under a valid grant for a few acres, a claimant in his petition may insist upon a vast domain," etc.

The court in thus speaking of a "valid grant for a few acres" falls into the mistake of begging the question. The question whether the grant is by metes and bounds or for a smaller quantity was pending before Congress and undetermined. The construction urged by claimant that the whole tract was conveyed could not be prejudged to be unlawful, and Congress had not decided it to be unlawful. Therefore there was no way of telling at the time the inclosure was made for how much the grant was valid, and any assumption of the court that the grant was valid "for a few acres" is purely gratuitous. When the court speaks of "a claimant insisting upon a vast domain," it falls into the error of presuming bad faith.

The irrefragable logic of this case we think is that as defendant had, before the inclosure, asserted his claim in good faith, under a law inviting him to do so, to the lands inclosed, he does not violate the act, because his claim cannot be prejudged to be unlawful, and any adjudication upon the claim cannot affect its good faith as it existed prior to such adjudication.

But if this court should take the view adopted by the lower court and should go into the construction of the title-papers to see what lands were granted thereby, we think we can show that the lower court was greatly in error in holding that this was a grant by quantity instead of by metes and bounds.

First. Historically this is impossible.

This strong language is used advisedly, for the reason that at the date of this grant grants made by the Spanish Government and afterwards by the Mexican State of the West were not voluntary grants for

services, or colonization grants, but were executed contracts of purchase, where the land, after certain preliminary proceedings, was put up at auction and sold to the highest bidder. Such so-called grants are confined to the land acquired under the Gadsden treaty. (Spaulding on Public Lands, Sec. 510.)

After the independence of Mexico in 1821, the old intendencia of the Spanish Government embracing the provinces of Sonora and Sinaloa was called the State of the West. What is now Arizona Territory was a part of this State. The act of the Mexican Congress of August 4, 1824, gave to this State the public lands embraced therein, upon an annual payment into the federal treasury, and this State in making grants or sales of land continued the system that had been adopted by the Spanish Government. The same formalities were observed; the lands were surveyed, valued, published for thirty days, and at the end of that time were sold at auction to the highest bidder. There were no grants by quantity in the State of the West at the time the grant under which defendant claims was made, because the colonization laws of the Mexican Republic of August 18, 1824, and the regulations of November 21, 1828, had not been passed, and when passed they did not apply to the State of the West, which owned its own lands, or other States, but applied only to the lands of the nation.

These laws this court will take judicial notice of, and therefore authorities are not cited. A summary of the laws is found in The Public Domain, pp. 1125-1131.

In the light of history we submit that this grant cannot be considered a grant by quantity, because it was made in a State where there were no such grants, and was made before the laws were passed under which such grants came into existence.

Second. Its form shows that it was not a grant by quantity.

Floating grants, or grants by quantity, or imperfect grants, were those where the title had not passed to the grantee from the government, because the proceedings had not been completed. As above stated, such grants were made by the governors of a department or territory of the Mexican Republic, and were subject to the approval of the Departmental Assembly. Such grants did not apply to any particular tract, but were grants of quantity, to be located within exterior boundaries, and in this way were floating grants. An imperfect grant was not surveyed at the time, but there passed only the "right to the quantity of land specified therein, to be afterwards laid off by official authority at the place or within the larger tract designated." (Hornsby v. U. S., 10 How., 224.)

When the grant under consideration is examined, it will be seen that it has not one feature of a grant by quantity. Inasmuch as this land is confined to certain lands around a fixed central point, it is absolutely impossible that it can be considered a float, or grant of the second class, as the lower court held. Counsel most respectfully urge this point upon the court, that this grant was made before there were any floating grants, and that, in addition, the land granted is pinned down, as it were, around a central point, so that it cannot float.

The expediente shows that a certain tract of land, being the same tract to which defendant asserts his ownership in fee, was measured and monumented; that this same tract, "*de todo del terreno*," was appraised. Evidence was taken that the petitioner could stock this same tract, "*el terreno*." Orders were given to sell the tract, "*el terreno*." The pur-

chasers bought the said tract, "*el expresado terreno*," and the part of the expediente showing the record of delivery of juridicial possession states that there was granted and adjudicated to the purchasers the said tract, "*dicho terreno*," on the positive and understood condition that they were to settle and occupy said lands, "*dichas tierras*," without any reservation of any part of the lands or the faintest suggestion that all were not to be sold.

As said by this court in U. S. v. Pico, 5 Wall., 538, were there any doubt of the intention to cede all the land within the boundaries designated in the title-papers, "it would be removed by the juridicial possession delivered to the grantees. This proceeding involved an ascertainment and settlement of the boundaries of the lands granted by the appropriate officers of the government, specially designated for that purpose, and has all the force and efficacy of a judicial determination. It bound the former government, and is equally binding upon the officers of our government."

The lower court arrived at the conclusion that although the title-papers show that a certain tract, containing sixteen square leagues, if all the measurements had been accurately made, was measured and monumented, only part of said tract was sold, namely, "four square leagues cornering on the place called the San Rafael de la Zanja." Counsel respectfully assert that such a grant as that was never before heard of. The books will be studied and the histories searched in vain, in the attempt to find authority for such a holding. The boundaries were always fixed before juridicial possession was delivered. Yontz' case, 23 How. 489, and Fossat's case, 20 How. 413, which the lower court cites in support of its conclusion, are in every way different from the case at bar, because they

were made by the governor of the department of California, under the colonization laws, and it is expressly stated that juridicial possession had not been delivered, so that the grants were imperfect grants, or grants by quantity. In the Fossat case the grant was, in terms, restricted to one league, and it provided for the measurement of the quantity granted and the reservation of the surplus. In the Yontz case the grant provided for the measurement of the tract and the reservation of the surplus. When specific boundaries are mentioned in a Mexican grant, and juridical possession has been given accordingly, such boundaries govern the extent of the grant. If it had been the intention to grant "four square leagues cornering on the place called San Rafael," four square leagues and no more would have been measured and monumented. Why was the entire tract measured? Simply because the entire tract was to be sold. Why were the ends of the measurements marked by piles of stone, "*en senal de mojonera*," as a sign for the placing of a land-mark? Because the land so marked was to be sold, and such land-marks were to show to all the world what land had been sold.

This, as has been said, could not be a grant by quantity, because the law under which such grants were made had not been passed; it was not a grant by quantity, because such grants were colonization grants, and were not made in the States of the Mexican Republic, of which States Sonora and Sinaloa were one, but were made only in the departments, or territories; it was not a grant by quantity, because grants by quantity were not surveyed at the time; it was not a grant by quantity, because juridical possession was delivered, and such a grant was always a grant by boundaries.

Third. The express language of the papers

shows that the whole tract as measured was appraised and sold.

The lower court says that "in this case a grant of four sitios is asked for, and nowhere throughout the whole expediente is any other quantity mentioned, and in the final decree the habendum clause grants four sitios." This statement of the court is opposed to the very language of the title-papers, as we believe will indisputably appear from the following citations and references to the expediente:

The "Ordenanza de Tierras y Aguas' " by Mariano Galvan, a Mexican classic of accepted authority, gives minute instructions for the measuring and monumenting of land according to what the author terms "the ancient forensic practice." Pages 182 and 225 may be referred to as stating the law, gathered from "Las Siete Partidas" and the "Recopilacion de Indias," to be that the actual measurements limited the grants made, that monuments were to be placed "una al fin de cada medida," one at the end of each measurement, and that the interested party was to construct, at his own cost, "monuments (mogotes ó mojoneras) of stone and lime, of more than a vara in height, to the end that in all time the boundaries of the land may be known and regarded by the adjoining land-owners." These monuments could be placed nowhere except on the boundaries as fixed by the official survey, at each place noted by the official surveyor as "en señal de mojonera," a sign or mark where a monument was to be afterwards placed by the interested party.

The inaccuracies in the translation of this grant obscure what is plain in the original Spanish. Only a few points will be noted in order to show that the entire tract measured was sold.

The petitioner represented that he needed a tract of land, "necesito de terreno," and denounced four

sitios, asking that orders be given for the measurement of said tract of land, "del expresado terreno."

Order was given for the measurement of the tracts of land, "los terrenos," petitioned for.

A day was appointed for the measurements of the "cuatro sitios de ganado mayor."

An examination was made of the tract of land, "del terreno," and measurements of it were made.

The measurements of the "cuatro sitios de ganado mayor" were commenced by running the line two hundred cords north, its termination being marked by a pile of stones, "en señal de mojonera," as a sign for the placing of a land-mark. This expression always means, in this and other similar grants, that the purchaser was to erect at this "señal" the monument required by law. The phrase has a well-known meaning, as designating one of the boundaries of land granted, and noting the spot at which the purchaser should erect an enduring land-mark, to show adjoining land-owners how far his land extended; and this phrase alone is sufficient to establish this boundary of the grant.

The line was next run to the south, terminating at a land-mark of the presidio of Santa Cruz, and then to the east, where its termination was marked by a pile of stones, "en señal de mojonera," as a sign for the interested party to erect at that point the monument of rough stone and lime required by law.

One hundred and thirty-three cords were counted towards the west, and the remaining sixty-seven required to make the two hundred were estimated on account of the roughness of the tract of land, "del terreno."

These measurements fixed places on the north, south, east and west where the purchaser of the land

was to place monuments to show how far his land extended.

There was then on the next day a continuation of the measurements of the tract of land, "continuacion de medidas al terreno." The word "medidas" means, also, boundaries, being the same word used in the petition of Bustillo where he asks for three sitios outside the boundaries of the presidio of Santa Cruz. Returning to the place at which the two hundred cords terminated on the north, two hundred cords were estimated on account of the roughness "del terreno," of the tract of land, to the north-east corner, "at which point a corner monument is to be placed." That is to say, the interested party was to place there a "mojonera esquina," to show to all the world that that place was a corner of his land. Two hundred cords were estimated towards the west, on account of the roughness "del terreno," of the tract of land, to a point which was to serve as a corner monument. From this point four hundred cords were estimated to the south to a point which was to serve as a corner monument for *these sitios*, "cuyo punto debe de servir de mojonera esquina á estos sitios."

This language fixes beyond all cavil one of the boundaries of the land granted. The only sitios mentioned in the title-papers are the ones denounced by Bustillo and afterwards bought by Romero. The lands petitioned for were ordered to be measured. San Rafael was taken as the center, and the expediente says that the point beyond San Antonio is to serve as one corner monument of the sitios petitioned for, appraised, and afterwards sold. With the center and the south-west corner monument absolutely fixed by the grant, the sitios must extend to the other corners, and must include the whole tract, "el terreno," if the plain language of the granting instruments is

not to be disregarded. That it was the tract of land, "el terreno," which was sold will appear in what follows.

The measurements were then continued, two hundred cords to the east, and then two hundred cords more to the corner monument, "mojonera esquina," of the lands of the Presidio of Santa Cruz, and the four hundred cords were estimated, on account of the roughness "del terreno," of the tract of land, to the north-east corner, "by which measurements was formed the square of the four square leagues denounced by Don Manuel Bustillo for the raising of stock, and as such he accepted the same; he being informed that in due time he was to mark the boundaries by establishing monuments of lime and rough stone, as required by law."

If additional proof were wanted that the purchaser was to mark his boundaries at the places fixed by the survey, that is, at the end of each measurement of two hundred cords, and nowhere else, it would be found in the words designedly used. He was to "señalar sus linderos." The Spanish officials piled up stones "en señal de mojonera," and when Bustillo is ordered to make the monuments of lime and rough stones the verb "señalar" is used to denote that such land-marks were to be put up at the "señal." This was the law. No one was permitted to erect boundary monuments except at places officially fixed, and after summoning the adjacent land-owners. ("Ordenanza de Tierras y Aguas," p. 185, bottom.)

There can be no doubt as to what was actually measured. A tract of land, called "el terreno," was measured and nothing else was, and this tract of land would be four leagues on each side if the measurements had been exactly made. On account of the roughness of

the tract of land, however, five of the ten measurements were estimated, and the tract is, therefore, of an irregular shape. The central point and other monuments and boundaries of this tract of land are clearly described in the expediente and unmistakably located on the ground to-day, being conspicuous and permanent natural objects. The question is, Was all of the tract of land, "el terreno," sold as measured, or part only, and, if part, what part?

It is submitted, as stated in the beginning of this discussion, that the well-known laws of Spain furnish a sufficient answer to this question. Lands were measured and sold as measured, and in no other way, and this land must have been sold as measured, namely, the entire tract. Any other view of the case, such as holdiug that four leagues, unsurveyed, not officially measured and monumented were sold, is not possible. And it is submitted that the language used in regard to the measurements shows that the boundaries extend to each "señal," and therefore include the whole tract. What follows seems to show indisputably that it was the "el terreno," or whole tract measured, which was sold, without the reservation of any part.

After the measurements were finished the next step was the appraisement. The land appraised was afterwards sold, and the language of the grant is that the appraisers valued the land according to the knowledge which they had "de todo el terreno," *of the whole of the tract of land*. Particular attention is invited to this language as showing what was appraised. It was, as the expediente terms it, "the whole of the tract of land," which is all the land embraced within the measurements actually made.

As proof positive that it was the tract of land

which, after having been measured, was afterwards appraised, the statement is next made in the grant that testimony was taken as to the ability of the denouncer to stock the land. What is the word used here in the original to show how much land was meant? It is the same word "el terreno," the tract of land, which was all embraced within the measurements. Unless the plain language of the grant is willfully disregarded, it is submitted that when the appraisement was made the land appraised was the tract of land measured, and that when testimony was taken it was as to the same tract of land, because the same word, "el terreno," is used throughout.

In this condition the expediente was referred to the Spanish attorney-general, whose official report seems to settle forever how much land was sold. He says he has examined with "marked attention" (con detenida atencion) the expediente of lands measured (de tierras mensurada)in favor of Bustillo, and he then recommends that an order be given for the sale of said lands. In the next sentence of his report the attorney-general recites the fact that the testimony showed that Bustillo possessed means to stock "el terreno," the tract of land, and then recommends that a sale be made of it, and the language used is "el terreno," *selling the tract of land.* He does not recommend that part be sold, but that the same tract of land which had been measured and appraised be sold.

Nothing can add to or take from this language, on this, perhaps as important a point as any in the controversy. "El terreno" is the tract of land, all the land embraced within the measurements, a tract of land four leagues on each side. The order is distinct that this tract of land be sold, and that the same

tract was sold, without reserving any part, will appear in a moment.

The government approved the foregoing report of the attorney-general, and a formal sale was made. What was offered and sold appears from the fact that Bustillo, as his first bid, bid ten dollars above the appraised value "del terreno," of the tract of land, the same tract which had been measured, which, as this and preceding language shows, had been appraised, and which was sold. The Señor Intendente then recites that the measurements, appraisement and sale were in all respects regular and sufficient, and, as if to reduce to absolute certainty the question of how much land was sold, recites that the purchasers were debtor to the government "por el expresado terreno," for the said tract of land, and the granting or habendum clause grants and adjudicates "dicho terreno," the said tract of land. If language is intended to express and not to conceal thought, it would seem that by "the said tract of land" he meant what he said, namely, the tract of land referred to in the papers, and being the tract of land measured, as there is no reference, near or remote, to any other tract.

But one conclusion, it is respectfully submitted, can be drawn from the language of the expediente. That conclusion is that a certain tract of land was measured and monumented, being the same tract claimed by defendant, and of which he is in possession. It was this same tract, "de todo del terreno," which was appraised. Evidence was taken that the petitioner could stock this same tract. Orders were given to sell this same tract, "el terreno." Bustillo bid ten dollars above the appraised value of this same tract, and the purchasers bought the said tract, "el expresado terreno," for which they were indebted to the

government. There was but one tract, and the papers refer to but one, though it is indiscriminately called "el terreno," seventeen times; "cuatro sitios de ganado mayor," thirteen times; "cuatro sitios," three times; "de todo el terreno," once; and "tierras mensuradas," the lands measured, once.

If it is urged that sometimes or in some places the grant calls for only four square leagues, while the measurements embrace much more, it need only be said that "It is no objection that the quantity is more than four times the amount stated in the grant, or that the lines are prolonged greatly beyond the distance." (Fullwood *v.* Graham, 1 Rich. [S. C.] 491, a leading case.)

"It is a universal rule in the construction of grants and patents that wherever natural or permanent objects are embraced in the calls," as in the present case, "these have absolute control, and both course and distance must yield to their influence." (McIver *v.* Walker, 4 Wheat. 444.)

"Where the boundaries of land are fixed, known and unquestionable monuments, although neither courses nor distances nor the computed contents correspond, the monuments must govern." (U. S. Digest, title Boundaries.)

Quoting the language of this court in U. S. *v.* Pico, 5 Wall., 538, if there were any doubt of the intention of the Spanish Government to cede all the land contained within the measurements of the grant, it would be removed by the juridical possession delivered to the grantees. "This proceeding involved an ascertainment and settlement of the boundaries of the land granted by the appropriate officers of the government, specially designated for that purpose, and has all the

force and efficacy of a judicial determination. It bound the former government, and is equally binding upon the officers of our government." "Measurement and segregation preceded the final delivery of possession." (See Malarin *v.* U. S., 1 Wall. 282.)

The question is always asked in regard to this grant, Why were sixteen leagues measured off when the grant calls for only four? The answer is very simple, and is this: What we call sixteen leagues the Spanish, in this grant, called four. The only confusion is in giving to the words "cuatro sitios" a meaning that they do not have in the grant. By "cuatro sitios," in this grant, was meant a tract of land four leagues on each side. When it is asked, Why did they measure off a tract of land four leagues on each side? the answer is that such a tract they called "cuatro sitios." In this view all the measurements, appraisements and sale were, as the government pronounced them, "in all respects regular and sufficient." That "cuatro sitios" meant such a tract appears from the following:

On the 22d of October, 1791, Don Pedro de Nava, Comandante General of the Western Provinces, made a decree which was approved by the Viceroy, of which the following is a translation:

"In conformity with the opinion of the Asesor (Counselor) of this Comendencia General, I have resolved, by decree of this day, that notwithstanding what is provided in Article 81 of the Ordinanzia de Intendentes, it belongs to the captains of Presidios to grant and distribute house lots (solares) and lands to soldiers and residents who may petition for such, for the purpose of establishing their residences thereon.

"Considering as sufficient for the new settlements (poblaciones) which are being formed under

the protection of the Presidios the extent of four common leagues, measured from the center of the Plaza of the Presidio, two towards each cardinal point (el termino de cuatro leguas comunes, medidas desde el centro de la Plaza del Presidio. dos por cada viento), I have determined, also, for the purpose of avoiding doubts and reclamations in the future, that the Captains, from the present date, in the concession of house lots (solares) and lands, shall be limited to the lands that may be embraced within the said four leagues, without in any manner exceeding the same; leaving free and unembarrassed the exclusive jurisdiction corresponding to the intendentes of the Royal Treasury, relative to the sales, compositions and distribution of the other lands of their respective districts.

"To the end that this order may be punctually observed, let the same be circulated to the Captains and Comandantes of the Presidios of that Province, notifying me of the execution of this order.

"May God preserve your life many years.

CHIHUAHUA, Oct. 22, 1791. PEDRO DE NAVA."

This order is found in Rockwell's Spanish and Mexican Law, 1851, p. 451.

A tract of land measured in accordance with the above instructions would be four leagues on each side and contain sixteen square leagues according to our numeration. But according to Spanish law it contains only four leagues. In precisely the same way the San Rafael grant was measured from the center two leagues towards each cardinal point. The tract of land so measured was considered to contain four leagues, "cuatro sitios," and using the words in this, which is their proper meaning, all difficulty disappears. The tract contains only four leagues, three of which were appraised at $60 each and the remaining one at $30, and all of which were sold.

The language used by the Circuit Court of the United States and by this court in the case of the U. S. v. Maxwell Land Grant Co. et al. (31 Fed. Rep., 19; 121 U. S. at p. 373), seems to apply to the facts in this case. Speaking of the Maxwell grant this court said: "It is entirely clear that this is a grant by specific boundaries, where the donee was entitled to the entire tract described. There is nothing in the language of the grant nor in the petition, nor in anything connected with it, nor in the act of juridical possession, to indicate that any one had any idea or conception that the grantees were not to have all the lands within the boundaries established by that juridical possession." As U. S. Circuit Judge Brewer said, in discussing the same grant, "When a report is made that a petition was filed for a grant of certain lands, describing them, and that such lands were granted and have been occupied by the grantees, no one would for a moment suppose that it was the intention simply to say that within the boundaries described there was a valid grant for a smaller and undescribed portion of land."

We believe that this court will hold that the lands inclosed instead of being "public lands of the United States to which defendant has no claim or color of title made or acquired in good faith," are defendant's private property owned by him in fee, and for this and the other reasons set out herein we submit that this case should be reversed and judgment entered for defendant.

Respectfully submitted,

ROCHESTER FORD,

Of Counsel for Colin Cameron.

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146 U.S. 533

SUPREME COURT U. S.
FILED.
OCT 17 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

COLIN CAMERON,

Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

JAMES C. CARTER,

Of Counsel for Appellant.

Albert B. King, 89 William St., N. Y.

U. S. Supreme Court.

COLIN CAMERON,
Appellant,

vs.

THE UNITED STATES.

No. 365.
October Term,
1891.

For the statement of facts, assignment of errors and authorities, reference is made to the brief of Rochester Ford, Esq.

The following is designed as a concise statement of the argument of the appellant upon the principal question.

First Point.—The statute of February 25, 1885 (23 Stat., 321), upon which the complaint in this action purports to be founded was not designed for the purpose of determining questions of title between the United States and others; but for the purpose of protecting those public lands of the United States as to the ownership of which there was no question, against *unlawful occupancy*.

It is a *penal* statute, any violation of which is punishable as a *crime*. It cannot have been intended to apply to any act in its nature *innocent*, such as the ordinary use by a person of property of which he believes himself, in good faith, and upon colorable grounds, to be the owner.

1. When a man is in the peaceful possession of land of which he believes himself to be the owner, and has evidences of ownership which furnish plausible support for such belief, he must be permitted, not only to defend himself in his possession, but to enjoy his possession as fully as any owner may enjoy it, until the question of title, if there be one, has been judicially determined.

   If, in point of fact, he is in error in his assertion of title, and some other party has the better right, that better right must be asserted in some judicial proceeding, and the only penalty to which the mistaken possessor can properly be subjected is the payment of costs and the liability to account for the profits of his unlawful possession.

2. There are, indeed, instances where persons enter upon and do wrongful acts upon lands to which they have no color of title. It is not sufficient for them to plead, in justification of such acts, that they believed in good faith that they had title, for this may always

be pretended. It is fair to require in addition that they should show that, although mistaken, they had grounds for their belief upon which differences of opinion might not unreasonably exist. Men have no right to form or, at least, to act upon *unreasonable* opinions.

The cases thus alluded to are those which are aimed at by statutes often enacted against what are called *criminal trespasses.*

These are sometimes framed in language sufficiently broad to render acts upon lands criminal which were committed in the honest belief upon colorable grounds, by the party committing them, that he had title; but Courts always restrict their application so as not to embrace such conduct. Any other doctrine would abrogate the essential distinctions between guilt and innocence.

People *vs.* Stevens, 109 N. Y., 159.

Second Point.—But, upon this point, in relation to the statute in question there is no room for debate or construction. Its express language, fully recognizing the reasonable doctrine above asserted, makes enclosures of land unlawful and punishable only where the party erecting them "had no claim, or color of title made or "acquired in good faith or an asserted right "thereto by or under claim made in good "faith with a view to entry, thereof at the "proper land office under the general laws of "the United States, &c." It thus recognizes

all the forms in which *possession* may be honestly, *though erroneously* taken and asserted, and excludes them from the category of guilt.

Third Point.—In order to justify a judgment in this action against the defendant it was necessary that there should be an *allegation* and a *finding* that he "had no claim "or color of title made or acquired in good "faith," &c., &c., to the lands inclosed.

The judgment is at once found to be erroneous, for, although there is an imperfect attempt to make the requisite allegation in the complaint, there is no pretense of a finding of the essential fact that the defendant had no claim or color of title.

Fourth Point.—The theory upon which the judgment of the Court below proceeds appears to be that it was incumbent upon the Court to determine, not whether the defendant had a colorable title which he asserted in good faith, but whether he had a *valid* title.

The Court, therefore, having found certain facts upon which, in its view, the question of actual title depended, proceeded to inquire into the title and found that, in respect to the place inclosed, the defendant was without title, and then, without inquiring into the question of the defendant's good faith, or whether he had colorable grounds for his claim, proceeded to render judgment against him.

Surely argument cannot be needed to show that this was a wholly erroneous view of the Statute.

1. Would even the learned Circuit Judge have instructed a jury, if the defendant had been indicted, and the same evidence had been given to support the indictment, that it might convict the defendant under the 4th section of the statute?

2. The learned Judge below argues that the defendant invoked his Mexican paper title in order to show that he had a *colorable* title (all of which is true), and then he proceeds to inquire whether this title embraces the premises enclosed. He holds that it does not; and then refers to authorities showing that the defence of a colorable title is not available in respect to premises not included in the deed which constitutes the colorable title! (Record, p. 70, *et seq.*). Of course it is true that where *color of title* is made out by showing a deed to certain premises,—that is where a man has or may have, no real title at all, to any of the premises in dispute, but seeks to show a *colorable* title, and to that end exhibits a deed, which, whether effective to convey an actual title or not, is sufficient to give *color of title* to the premises embraced by it,—such deed will not give color of title to other premises which it does not *purport* to

convey. But, can the learned Judge mean that where a deed is exhibited, the validity and effectiveness of which nobody doubts, and as to which the only question is whether it does or does not embrace the premises in question, a *colorable* title is not shown to all premises which the deed may fairly and in good faith be asserted to embrace?

Color exists were there is doubt and contention, and where rival claimants can offer fair reasons and grounds to support their respective views. Does it not exist just as much where the doubt and contention arises upon the extent of the premises conveyed by it, as where such doubt and contention concerns the interpretation or effect of the deed in other particulars?

3. The learned Judge did not seem to perceive that his decision involved him in a great inconsistency. He held that the grant was of four leagues, to be laid out within larger designated limits—in other words, a *float*. Now, in order to attach that right to any particular lands, it was necessary that a survey be had, and that the same should be approved by Congress. It seems that the surveyor general had laid out a certain four leagues; but this, without more, would not convey a title. Consequently, upon the view of the learned Judge, it would follow that the defendant could not, under this grant, indisputably valid, and which had been acted upon for half a century as a completed title, inclose any land whatever.

Fifth Point.—But although the present action was not one in which the question of title could be determined and adjudged, nevertheless the evidence shows not merely a *colorable*, but a valid and perfect title to the premises enclosed.

1. The title papers, in the first place, show a proper proceeding by way of petition to obtain a title to lands. (Record, pp. 21-22.)

2. In the next place they show a regular proceeding to identify and describe the lands with a view to a future grant. (Record, pp. 22-25.) And the effect of this proceeding was to describe and bound the lands, a grant of which was sought. And this description confessedly embraced the premises enclosed.

3. They further show appropriate proceedings to ascertain the price of the lands, and an actual payment of the price ascertained. (Record, pp. 26-27.)

4. Then follows a *grant* which purports to be a final and perfect transfer of title to the land measured and described. This grant is susceptible of no other interpretation. It contemplates no further proceeding by way

of sur vey. It is based upon the measurement and description which had already been made; and it contemplates and *decrees* immediate *possession*—a possession possible only upon the assumption that the lands were ascertained and described (Record, pp. 27, 28).

5. These acts were fully sufficient to vest in the grantees what we understand by a *legal title.*

6. The ground upon which the learned Judge in the Court below proceeded was, that this grant was one of *quantity* only within larger outlying boundaries. What foundation is there for such a view? *There had been a survey*, which could have had for its purpose nothing else except to ascertain the precise premises to be conveyed. Surely the design could not have been to lay out and describe by measurements, metes and bounds, *sixteen* square leagues, to the end that another survey should afterwards be had of *four* square leagues, which should be made the subject of conveyance.

Nor can it be supposed that the *value* of the land should be ascertained by rival bidding, and that it should be actually *paid* without any specific lands being ascertained.

7. The case upon which the learned Judge appears rely in support of his opinion rather

establishes the contrary view (Fremont *vs.* The United States, 17 How., 542). In the case of that grant, there had been *no survey*.

Sixth Point.—The real ground, probably, which controlled the opinion of the learned Judge below was that which governed the action of the Surveyor-General, of Arizona, in his recommendation of a new survey, embracing four square leagues only (Record, pp. 47 et Seq). This ground was that an intention to convey four leagues square, on a proceeding to acquire title to four square leagues "was too extravagant for belief" (p. 51). But this positions instead of a leading to a conclusion against the defendant, required one in his favor. It concedes that the *obvious*, *apparent* and *natural* interpretation of the grant would make it include sixteen square leagues, and the premises in dispute. If this be true, nothing more can be needed to show that the plaintiff had *color* of title, at least, even if it were susceptible of argument that this natural interpretation could be overcome by any consideration of its supposed *extravagant* character.

Seventh Point.—Were we required in this case to make out an absolute legal title to the whole sixteen leagues we should argue with entire confidence that the title papers are susceptible of no other interpretation.

These papers contain an express grant of lands by *metes*, *measurements*, and *bounds*. *No indefiniteness or uncertainty is suggested.* The notion that in the interpretation of a deed its express language can be overruled and disregarded because it is supposed to effect an unjust result, or a different result from what was intended, should be promptly rejected.

1. If the deed involves an unjust consequence or in any way defeats the intention of the parties, there is an appropriate judicial proceeding by which such errors may be corrected.

2. It is *possible*, as suggested in the report of the surveyor general (fol. 50), that from ignorance the simple minded Mexicans who made the survey were unable to see the difference between four square leagues, and four leagues square. It is *possible* that they supposed the grant to be of four leagues square, when it was really intended to be of four square leagues only. It is *possible* that the grantee by *fraud* induced the surveyors to lay out to him four leagues square, when, otherwise, they would have measured only four square leagues.

   If either of these things be true there was sufficient ground upon which the Mexican Government might have instituted proceedings to correct the grant. The United States

Government succeeded to that right, and may possibly still be able to assert it.

But none of these considerations affect the *interpretation* of the grant. On the contrary they all *concede* that the effect of it, so long as it stands, is *to convey the legal title* to the whole tract as surveyed.

3. But it is also *possible*, that the grant of four square leagues was entirely honest and just what was intended. If there was any measure of ignorance among the simple Mexicans, which led them to confound four leagues square with four square leagues, why were they not as likely to *write* four square leagues, when they meant four leagues square, as the reverse? If a mistake was committed, it is more probable that the mistake was in the *writing* than in the measuring.

The assumption of the Surveyor-General and of the Court, seems to have been that it was incredible that the Mexican Government could have intended to make a grant of four leagues square. Where is the foundation for such an assumption?

4. Let it be supposed that a bill in equity were filed by the United States to correct this grant; or, should confirmation of it by Congress be required before its absolute validity could be established, (which is not

supposed to be the case), that Congress should have the question of confirmation before it, what would be, so far as we are aware, the state of the case.

a. So far as the suggestion of a mistake arising from ignorance and leading to a confusion of four leagues square with four square leagues goes, it is at least as probable that the measurers *did* what was intended as that the scriveners *wrote* what was intended.

b. So far as any suggestion of *fraud* is concerned, there is absolutely no evidence.

c. But against both, and all other, suggestions of error the lapse of time would be a conclusive answer.

The grant was made in 1822, and from that time until the transfer of sovereignty in 1854, and continually thereafter, the grantees and their successors, as was proved and expressly found (Record, pp. 9, 29), always claimed title to the whole tract as measured.

This claim must have been known to the Mexican authorities. Had it been the prodigious mistake or prodigious fraud suggested, that claim would have been challenged while the facts were recent, and have been corrected.

The absolute silence of the Mexican Government should be conclusive. If that

government rested for more than thirty years, without in any manner disputing the pretences of the grantees, the United States can have no reasonable ground for breaking the silence and raising a dispute which could be justly settled only by a knowledge of all the facts and circumstances attending the transaction—a knowledge which it is impossible after the lapse of seventy years to gain.

And especially unjust would it be to deny, after such a long silence, the validity of a title which has been transferred to *bona fide* purchasers for value, who had no reasonable ground to apprehend that a contest over it would be started after such a long interval.

Lastly.—The grantees under this grant have neglected no step which would evidence the good faith of their assertion of title. They needed to take no step until the transfer of sovereignty. They then brought their title before the Surveyor-General of Arizona, and the validity of his disposition of it was pending before Congress at the time of the beginning of this suit.

The decree of the Court below should be reversed and the cause remanded, with directions to enter a decree dismissing the bill of complaint, with costs.

JAMES C. CARTER,
Of Counsel for Appellant.

146 US 533

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JAMES H. McKENNEY.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

COLIN CAMERON
vs.
THE UNITED STATES. } No. 42.

APPEAL FROM SUPREME COURT OF ARIZONA.

BRIEF AND ARGUMENT OF APPELLEE.

W. H. BARNES,
Of Counsel for Appellee.

In the Supreme Court of the United States.

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COLIN CAMERON
vs.
THE UNITED STATES. } No. 42.

APPEAL FROM SUPREME COURT OF ARIZONA.

BRIEF AND ARGUMENT OF APPELLEE.

May it please the court:

This is an appeal from the judgment of the supreme court of Arizona, affirming a judgment of the district court.

This suit was on behalf of the United States to compel defendant, Cameron, to remove a fence alleged to have been erected upon public lands in violation of sections 1 and 2 of the act of February 25, 1884, entitled "An act to prevent the unlawful occupancy of the public lands." (23 Rev. Stat., p. 321.)

Defendant admits the construction of the fence, but sets up in justification a title derived from Mexico prior to the acquisition of the territory by the Gadsden treaty.

On the trial he offered in evidence his title, called an *expediente*, as the basis of his claim to the lands fenced.

This title, the evidence shows, has never been confirmed by Congress, but the same has been reported upon by the surveyor-general of Arizona as valid to the extent of 4 square leagues, and no more, and the same has been transmitted to Congress, and there no action has been had.

The fence has been erected upon lands outside the 4 square leagues which the surveyor-general finds to have been granted by the *expediente*.

The defendant urged, however, such a construction of the *expediente* as shall include the lands fenced within the lands granted therein. He asserts that construction so as to meet the language of section 1 of the statute above referred to.

The language is :

> That all inclosures of any public lands * * * heretofore or to be hereafter made * * * to any of which land included within the inclosure the person * * * had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws, * * * are hereby declared to be unlawful, * * * and the assertion of a right to the exclusive use and occupancy of any part of the public lands * * * without claim, color of title, or asserted right, as above specified as to inclosure, is likewise declared unlawful.

The case hinges upon whether the fence erected by defendant inclosed public lands to which he had no claim or color of title made or acquired in good faith.

An assertion of right to occupancy, no matter how plausible or how sincere, is prohibited and is unlawful if it be without claim, color of title, or asserted right to make entry under the land laws.

Defendant therefore offered his title set forth in the *expediente* as his claim and color of title, to take him out of the prohibitions of the statute.

We then proposed to look into his paper title to see what lands are granted thereby or purport to be granted, to measure its boundaries, and to see if the inclosure complained of is within the limits of the lands granted. He objects to this. He says the titles to Mexican grants may not be determined by the courts. It is not a judicial question how much land is granted. That is for the legislative branch of the Government, and Congress alone can determine that. He insists, however, that he has filed a petition to the surveyor-general, and with it his title papers, in which he asks the surveyor-general to ascertain and report the origin, nature, character, and extent of this claim to land under the laws, usages, and customs of Mexico, and report the same to Congress for such action thereon as shall be deemed just and proper. And that in his petition he asks to have confirmed to him some 30 square leagues of land. He urges in his petition his construction of the *expediente* to be, that it is a grant for some 30 square leagues, instead of 4 sitios, and that as the land fenced is within the boundaries of lands he petitions

to have confirmed to him, that this petition for confirmation is a claim of title under the section of the statute above referred to.

The argument is that, as defendant asserts that the *expediente* grants to him this large tract of land, this mere assertion amounts to a "claim or color of title," and that the court can go no further; can not look into his *expediente* offered in evidence to see what is the limit of his "claim and color of title."

This position is clearly untenable. It is based upon a wrongful definition of the word "claim." The word is used in more than one sense:

First, "to call for." Second, "to assert or maintain as a right." Third, "to have a right or title to—as the heir claims the estate by descent."—Webster.

In this statute it is near to the third definition. It is not a mere assertion of, but there must actually be, a right or title. It means this and more as a legal term. Burrill's Law Dictionary: "An ascertained right to property in possession of another."

It is absurd to say that in this law the word "claim" means any assertion of right, no matter what founded upon or how fallacious it may be. A petitioner under that construction might as well assert title to, or claim 40 or 400 sitios, and ask for confirmation, and upon such a construction of his *expediente* fence in any quantity of land and hold the use of it.

The other construction, that the term "claim" or "color of title" in this act is used in its well-known legal meaning, is reasonable. We must suppose that law-makers use terms in their well-known meaning, and when they use

technical legal terms, that they are used in their technical legal meaning.

There is no term more clearly defined, with a meaning more certainly known, than the term "claim and color of title."

It is the basis of an adverse possession, upon which limitations must rest. This may depend upon some written instrument or upon a disseisin—

> In the former case, the extent of claim and constructive possession of the party making the entry, and occupying under it, is often referred to the description of the premises in such deed or written instrument; whereas, in the latter case, the possession reaches no farther than there is a *pedis possessio*, an actual occupation by some defined, certain limits, indicated by a substantial inclosure, or something of like notorious character. (Washburn, Real Property, Book III, Chap. II, Sec. 7, Vol. 3, p. 137, 4th ed., and cases cited.)

Claim and color of title must be founded either upon a paper title or occupation. If upon paper title, it is limited to the lands described; if upon occupation, it is limited to the land occupied.

(See opinion of Supreme Court of Arizona, p. 71 of this record, and cases cited.)

In this case, therefore, as defendant offered his paper title in evidence as his "claim and color of title" to the lands fenced, the court must look into this title to see what lands are therein described.

As he justifies the erection of the fence by this paper title, his defense falls.

This necessarily brings us to a consideration of the *expediente* in evidence and a construction of it.

We find here a procedure invoked by the petitioner for the purpose of acquiring a title to land under the laws of Mexico. To effect a grant, the proceedings pointed out by the law must be complied with. Hence, it should be construed, not like a deed by a private person, but as a judicial sale would be construed. (*Hyman* vs. *Read*, 13 Cal., 445; *Chas. River Bridge* vs. *Warren Bridge, etc.*, 11 Peters, 589, and cases cited.)

Such grants shall be "taken most beneficially for the king and against the party." A careful reading of this whole *expediente* will lead to the conclusion that it is a grant of 4 sitios at the point *la Zanja* and no more. This construction is certain. By any other construction the grant is void for uncertainty. (*Shakleford* vs. *Bailey*, 25 Ills., 351, and 10 N. Y., 630.)

It is urged, however, that as the persons making the survey starting from the point *la Zanja* ran lines from this center point to landmarks 10,000 varas away, and ran around the outside of these points so bounding a tract of land containing more than 30 sitios, that the lands so bounded are granted.

The context clearly disputes this claim. The exterior points were evidently fixed to establish the center point where the 4 sitios granted cornered, as by fixing that point the lands granted were made certain. Here was a vast domain unsurveyed. There were no established meridian or range lines to tie on to. Mexican and Spanish surveyors always established the center point by natural objects. (Hamilton's Mexican Law, p. 103.) "The dis-

tance from the center of each sitio to each of its sides should be measured directly to the cardinal points of the horizon and should be 2,500 varas."

A sitio is as certain a description as a section under our laws. A grant of 4 sections of land at the point where a certain meridian crosses a certain range in an act of Congress would be clear and certain; would mean those 4 sections which corner there and no others.

It was urged, however, that the words of limitation, "four sitios," are to be disregarded as *falsa demonstratio non nocet.*

This rule may be invoked to aid, but never to defeat, the evident intent. (See cases cited, p. 70, Transcript *in hoc.*)

Frémont's Case (17 How., 542).
Hornby's Case (10 Wall., 332).
Arviso Case (8 Wall., 339).
United States vs. *Pico* (5 Wall., 539).
Yountz's Case (How., 498).
Fassett's Case (20 How., 515).

The withdrawal of these lands from entry by the executive department of the Government was done to preserve the *status in quo* until these claims be settled. On the other hand, such withdrawal did not authorize the claimant, pending action by Congress, to fence and so to destroy the *status.*

The act of July 15, 1870 (16 Stat. L., p. 304), omitted the clause of the act of 1854 (10 Stat. L., p. 300), authorizing the withdrawal of these lands.

These lands are within the Gadsden purchase. Article VI of that treaty (The Pub. Domain, 1883, p. 137) provides—

> No grants of land * * * will be respected or considered as obligatory which have not been located and duly recorded in the archives of Mexico.

In acquiring territory from a foreign state the sovereign acquires the fee. It is a transfer of political domain and of the proprietary interest in this land.

Botiller vs. *Dominguez* (130 U. S., 238).
Tameling's case (93 U. S., 644).

Until Congress parts with the fee, it is part of the public domain.

The United States by treaty stipulated to part with the fee to claimants to land so "located and recorded."

Until the lands are designated by law or by a tribunal created by law these lands are public lands.

Since this case came here on appeal Congress has created such tribunal to which claimants may go and have their title adjudicated. (Act of March 3, 1891, entitled "An act to establish a Court of Private Land Claims, etc.")

There he should go, and when his title is determined and the boundaries settled he can fence and occupy. Until then he is a tresspasser upon the public domain against the prohibitions of the act of 1885 under which these proceedings were instituted. To hold otherwise is to say that all claimants to lands acquired from Mexico may fence in all the land they think or assume to think are embraced within their boundaries and so hold these vast domains, in this case nearly 160,000 acres, until final adjudication.

The land court act, section 8, does not compel those who claim to have what are erroneously called "perfect grants" to go into that tribunal. If they are allowed to fence and so exclude others, and in effect drive settlers within the fence out, they will have no motive to go into that court at all, as they have already by their own act adjudicated in their own favor and this case permits them to remain.

Appellant in his brief, anticipating the argument to be made, that a mere claim for a vast domain upon a grant valid for a few acres, says the argument is "gratuitous" and presumes bad faith. I am willing to accept that issue. I submit the map offered in evidence in connection with the evidence of the witness Roskruge (page 64 transcript). Each of the squares is a section; that is, 1 mile square. The heavy line shows domain to which appellant asserts title under this grant. It is about 274 square miles. Four sitios at the point La Zanja would be near to 36 miles. The grant is for 4 sitios at the point La Zanja; 3 of them were with water and 1 of them without. The original petition was for 3 sitios. At the time of the measurement the petitioner asked that, as the place Los Cajoncitos is within the common lands of the Presidio, it should be added to the 3 sitios; hence the grant was of four sitios. Here I wish to criticise the translation in evidence.

The phrase "cuatro sitios" is translated "4 square leagues." The word sitio does not mean a square league, and should not be so translated. The word *legua*, which means league, is never used in granting land in Mexico. A sitio is a square, 2,500 varas, from the center point to

the center of each of the four sides toward the four cardinal points of the compass. It is a square, each side of which is 5,000 varas. (Report Surveyor-General, T. R. 49.) *Cuatro sitios* is four of these squares. It can not be contended in good faith that this grant of "cuatro sitios" means a grant of the domain contended for. (Mr. Benjamin, May 19, 1860, Senate Reports, Private Land Claims, 45 Cong., Part I, p. 518.)

Chairman Senate committee, in a report on the Scolly Case, where *cinco leguas cuadradas*, which is properly translated *5 square leagues*, were granted, although claimants were put in possession of 5 leagues square by the local magistrate, said "that to claim that that was a grant of 5 leagues square is too extravagant for belief." He was probably the most learned Spanish scholar of his time, and must be taken as high authority; and in this case Surveyor-General Wasson of this claim says the claim to 16 square leagues he regards as "too extravagant for belief." If this grant had been for *cuatro leguas cuadradas*, then a question of the use of words and translation would arise as to whether in translating the word *cuadradas* should precede leguas. Benjamin translates the phrase 5 square leagues. The English language places the adjective before the noun, the Spanish after.

We say "hot water," the Spaniard says "agua caliente." We say "white gold," he says "oro blanco." We say "red mountain," he says "cerro colorado." (Trans., p. 15, line 2). Same page, he says, "agua permanente," which we properly translate "permanent water." Such is the idiom of the two languages. This led Mr. Benja-

min to this conclusion. This case is much more certain, as we are not to consider this idiom. The term leguas cuadradas is not used. Here we have the term sitio, not legua, and cuatro sitios (4 sitios), not cuatro leguas cuadradas.

Four square leagues are granted. We therefore doubt the good faith of such an extravagant claim as is urged upon the court in this case. The fence in this case is on the map near where the words "Turkey Creek" are found. It seems to be trifling with the court to expect any such construction of this conveyance, for it is nothing more. The phrase *sitio de ganado mayor* is the unit of survey in Mexico, analogous to section or township with us, and expresses a tract of land of certain area. By proclamation in 1878 President Diaz announced the value of the public lands in each State in Mexico per sitio. (Hamilton, p. 148; sitio defined, *ib.*, p. 103; Galvan's ord's de Terras y Aguas, p. 157, chap. x; Hall's Mexican Law, sec. 201.) By treaty the ratios of land measurements were settled, and a *sitio de ganado mayor* was described as a square 5,000 varas on each side and to contain an area of 25,000,000 varas. (Pub. Domain, 399). The order of Nava says, within a tract of 4 leagues, *dos leguas*, each way, from the presidio, he may grant houses, lots, etc. *Cuatro sitios* is not used. Sitio is area, legua is distance. This by no means explains the anomaly, but is authority contra. (Appellant's brief, p. 43; Hamilton's Mexican Law, 99; Rockwell, S. & M., p. 451.)

The construction we give to this grant is the only clear and certain construction possible, viz, the 4 sitios which

corner at the point La Zanja. Appellant can have no claim or color of title by virtue of this expediente, offered in evidence by him as his claim, to any land beyond the boundaries of those 4 sitios. By the authorities above cited there seems to never have been any other construction, and there is no conflict of authority anywhere. No case has ever been cited by counsel in this case or mentioned in any book where any other construction has ever been given, except two. One, the attorneys for Scolly, rejected by Senate upon the report of Mr. Benjamin, *supra;* the other by the counsel in this case. It passes human understanding to believe that a claim in good faith is made to the enormous domain of about 160,000 acres by a construction of the two simple, clear, and certain words *cuatro sitios*, as to the meaning of which there never has been, can never be, any doubt. It is a strained and forced construction, to say the least. The enormous interest involved in this construction alone explains it. This grant is to be construed by fixed and certain rules of construction. Apply these rules and there is no doubt. The fact that in making measurement for center point La Zanja lines were run ten or more thousand varas to designated points, and lines from these points were run or estimated, closing in an area of many sitios, does not destroy and falsify a grant of 4 sitios. The evident intent drawn from the whole paper must govern, not from a part of it. The intent is clear to grant 4 sitios, three with water, one without water. The measurement does not purport to be of the land sold. The lands measured were not sold. Four sitios at the point La Zanja were sold. The measurements fixed that point.

If it did not purport to bound the land sold, then we would come to construe the intent. If the boundary made the intent certain, then that would govern; if not, it will be rejected. There is no doubt here of the intent or of what was granted. There is therefore no room for construction.

I append to this brief a letter from Mr. H. O. Flipper, a distinguished Spanish scholar and civil engineer, who has during the last ten years been engaged in public surveys in Mexico. He shows that the construction in Mexico of such a grant is the same we urge here.

If one takes a pair of dividers and places one leg at the "South Ct. Mon." about a half inch south of "U. S. Mon." and opens so that the other leg shall rest on the point La Zanja, he will span 200 cordels measured in the *expediente*. If the leg be left on the point La Zanja and and the other turned to a point north of La Zanja, the legs will span the line measured to the north in the *expediente*, and the north line will rest on a line east of Harshaw. This is the north limit of the land measured, yet appellant claims the north line of his grant to be 5 miles north of this north end of the measured boundary. Turn the leg to the east and then to the west and we have the 16 leagues. At Jaralito is the southeast corner monument mentioned in the *expediente*. Yet appellant claims his grant to run off to the northeast so that his east line is 4 miles farther east than the southeast corner monument and 4 miles farther than 200 cordels. Was there ever a more absurd claim urged upon a court of justice?

Again, remember that 200 cordels is 2 leagues or 5 miles 16[66] chains. Put one leg of the dividers again on the

point La Zanja and count five quarters of the squares, each 1 mile, and we have a point on the map 200 cordels from the center. In this way we see the length of the lines measured. And again we see the absurdity of the claim here. Not content with 16 leagues, appellant contends for a much larger area, including the town of Harshaw, Washington Camp, Mowry, and all the mines in that region. If it was proper for Mr. Benjamin to express impatience at the manifest injustice of the claim of Scolley, what shall we say of the good faith of this most exorbitant and extravagant claim? Does it not savor of blackmail?

So far we have treated this grant as valid, for the reason that in this view of the case the fence is beyond the land granted. But we may as well urge here that by the laws of Mexico this grant never had any validity. We agree with counsel that of the laws of Mexico the court takes judicial notice. (Appellant's Brief, p. 31, pages 15, 16.) Appellant urges that this grant was made under the laws of the State of Sonora and Sinaloa, and not under the colonization laws. The authority of the State of Sonora to dispose of public lands he insists is derived from the act of the Mexican Congress of August 4th, 1824. He asserts that this act gave the State of Sonora the public lands embraced therein. This we deny. In order to fully understand the jurisprudence of Mexico as to the public lands, it is necessary to review the legislation bearing upon this subject. We find this done fairly well by Hopkins Pub. Dom. (p. 1125, *et. seq*). By the laws of Spain the public lands belonged to the Crown, and were disposed of by royal cedula from time to time.

October 15, 1754, royal instructions were issued providing for the sale and disposal of public lands. The provinces of Sonora and Sinaloa belonged to the Audiencia of Guadalajara. This law remained in force until 1786, when the royal ordinances of intendentes were issued, and by them New Spain was divided into twelve districts, one of which included Sonora and Sinaloa, of which Arizona was a part. Article 81 of these ordinances provides the procedure by which the public lands were to be disposed of. Over each of these districts a govérnor or intendente was appointed, who was subordinate to the authority of the Viceroy, but who had charge of the sale or granting of the public lands within his district. Under this and subsequent laws a system was developed for the disposal of the public lands, which included a petition, survey, appraisal, publication, and public sale. The same when completed was required to be sent to the "Superior Junta de Hacienda" at the City of Mexico, for approval. If approved, it was there recorded and returned to the intendente of the district, and the title was complete. This proceeding affected an absolute sale of the land, and without condition except as to mines of the precious metals. This system remained in force until the revolution, although on the 23d of December, 1818, the Council of the Indies at Madrid, by the approval of the king, decreed that the sale of the public lands should belong to that department, and the commanders of districts were prohibited from disposing of the public lands.

Hall's Mexican Law, section 188, the order of Nava, 1791 (Plaintiff's Brief 43 Hall, Sec. 185), authorized cap-

tains of presidios to distribute house lots within a limit of two leagues to each of the four cardinal points from center of the presidio, to citizens and soldiers who desire to reside there. The garrison was to be the center of a square, four leagues on a side, within which he might grant lots for homes. He evidently had doubts about his power to make the order. Such was the condition of affairs when the independence of Mexico was recognized on September 27, 1821. Then this system, with all other laws for the disposal of the public and vacant lands in New Spain were overthrown. The vacant public and crown lands then became the absolute property of the new republic. None of the old laws remained in force, and these lands could not be sold or disposed of until such sale was provided for, by the new government. Hence a claim founded upon an alleged grant or sale after September, 1821, must be founded upon some law enacted after that date. (*U. S.* vs. *Vallejo*, 1 Black, p. 541.) A claim was set up to lands alleged to have been sold to Vallejo by the governor of California, 1844.

Authority for this sale was urged in the decree of the Cortes, 1813, authorizing the ceding of certain lands to the defenders of the country. (Hall, § 88.) The Supreme Court rejected the claim, holding that the laws enacted by Spain prior to the revolution "did not remain in force after that event, unless re-enacted by the congress of Mexico." The law (1813) may be very properly referred to as the foundation and source of many titles to the public lands in the Mexican Government, and also of titles in the province or territory of California, if any were de-

rived under it during the authority of the Spanish Government. The change of the government would not affect them. But grants made after this change and the establishment of the new and independent government present a very different question.

We think it quite clear that this law could not have been in force after the change of government unless expressly recognized by the Mexican Congress, and not then without being first essentially modified in its policy and purposes.

This reasoning as to the decree of 1813 applies equally to any other law or decree of Spain for the disposal of the vacant and public lands in Mexico, and authority for the disposal of the vacant and public lands in Mexico must be found in laws enacted after September 27, 1821, the date of the independence of Mexico. (*Leese & Vallejo* vs. *Clark*, 3 Cal., 24; *U. S.* vs. *Workman*, 1 Wall., 745.)

The presumption as to power of officers does not apply to Mexican titles issued since independence, September 27, 1821. (*U. S.* vs. *Combuston*, 20 How., 59, Co. Bk. 15, p. 828.)

The reading of this expediente shows that the proceedings followed exactly article 81 of the ordinances of intendentes. The petition was made a few days before the recognition of independence and evidently in expectation of that event. At that very time petitions were made for grants the history of which is like this one, and by the same officers, viz, Private Land Claim De Sonoyta, Babocomari & Boquillas, and others, all of which are awaiting confirmation. They proceeded to measurement,

appraisement, and sale at auction in 1822. They proceeded no further for three years. The Superior Junta de Hacienda, at the City of Mexico, to which, under article 81, all applications must be made for final approval, no longer existed. There was no authority of law to complete the grant whatever. The proceedings were void. Of this there can be no doubt. *U. S.* vs. *Vallejo, supra; U. S.* vs. *Workman, supra.*

An enactment by proper authority might cure, but in the absence of such authority the grant could not be made. The Supreme Court of the United States, in the last above cases, says that after a careful examination they find that the first enactment of the Mexican Government as to the public lands is the act of 18th August, 1824, and they say no law prior to that had been cited. This was the colonization act of that date. Appellant, however, asserts that August 4, 1824, a law was enacted granting the public lands to the States and Territories. I append to this brief a translation of the act of August 4, 1824.

> *Legislacion Mexicana ó coleccion completa de las disposiciones expedidas desde la Independencia de la República, etc.* At date. (Statutes at Large of Mexico.) Vol. 1, p. 710.

It has been claimed that the eleventh section of this act is a grant of the public lands to the States.

I have before me three translations of this act made by different persons, many years apart, and all translate the word "rentas" revenues.

It is evident that this act did not deal in any manner with the public lands of the nation. Its subject-matter

was the ordinary revenues of the Republic derived from duties and excise taxes. It is a surrender to the several States of the right to raise revenues by taxation in all forms, except those reserved, including taxation of real and personal estate, issuing licenses, etc., but it is clearly not a grant to the States by the Republic of the title to the public lands. It clearly does not cede to the States the right to convey and sell or otherwise dispose of the public lands. It is much less strained to construe the eighth section as a reservation of the lands to the Republic.

The word territories in that section would seem to mean public lands. What else can be meant by "The revenues from the territories?" It has been conceded everywhere that the act of August 18, 1824, fourteen days after the said revenue law, in the same session of Congress, composed of the same members, and sitting at the same place, had for its object the disposition of those national lands which are neither private property nor belong to any corporation or pueblo, and directs the several States to make laws and regulations for the colonization, not sale, of such lands. This court in the above case holds this to be the first law of Mexico for the disposal of the public lands, and says that it is the formation of a general system by which the public lands should be treated. It would seem remarkable that such a law should be passed, when but a few days before all these lands had been granted to the States absolutely.

It is a strong contemporaneous legislative construction against the construction that the lands were granted to the States by the act of August 4, 1824. On reference to

pages 26, 27, Tr., we find that the sale of the land was had January 8, 1822, at auction, and Romero, for himself and other citizens of Santa Cruz, became the highest bidder. The *expediente* then says, "as soon as these payments shall be made, the same shall be forwarded to the *Superior junta de Hacienda*, for approval." The junta had been abolished before that by operation of the independence of Mexico.

On the 11th of January, 1822 (see certificate on page 27, Tr.), Romero paid the amount bid by him to the ministers of the treasury at Arispe, in Sonora.

On the 15th day of May, 1825, Riesgo certifies that the expediente remains on file, the superior junta having been abolished. Then he recites that under article 81, ordinances of intendentes, and the instructions of October 15, 1754, in the name of the Mexican Republic (not in the name of the King and not in the name of the State of Sonora), I grant, etc. If article 81 ceased with independence, also instructions of 1754, those laws do not give validity to these official acts.

The act of August 4, 1824, by no construction gives authority. All that is claimed for that act is that it grants the public lands to the States. Before officers of the State could convey, legislation by the State must first be had. There was no act of Sonora authorizing Riesgo May 15, 1825, to make this grant.

Hopkins (Pub. Domain, p. 1127) says that May 20, 1825, the State of the West passed provisional law No. 30, regulating the sale of public lands. This act was not retroactive or curative. Hence it does not give validity

to the official acts of Riesgo to grant this land five days before the law was enacted. That law may be found in Orders and Decrees, Sonora and Sinaloa, 1821–1835.

This expediente can not stand upon the act of 18th August, 1824, which is the well-known colonization act. This act does not provide for the sale of land. It gave the right to colonize, and upon compliance with the provisions of the act a title matured otherwise was forfeited.

We insist also that the State of Sonora was never the owner of public lands within her borders. They were the lands of the King. When the independence of the Republic was established they became the property of the Republic, and could not become the property of the State except by legislative grant to the State. Such grant can not be found in the laws of Mexico. As we have seen, the act of August 18, 1824, treats the public lands as the property of the Republic, and provides for their settlement by colonization. It requires the State to make rules and regulations for the establishment of colonies. This refers to the police powers and municipal regulations. (Hall's Mex. L., p. 147, *et seq.*; Hamilton's Mex. L., p. 133.) This expediente does not purport to have been made, under that law, and it is not so claimed by appellants. Then there is no law to sustain it, and the acts of the officers who have done it are void. It is as if the governor of Arizona should issue a patent to the public lands. Being void, no claim or color of title can be based upon it.

November 25, 1853, President Santa Ana issued a decree that the vacant lands were the property of the nation, and ever had been and could never have been alienated

by the officers of the States and that all such sales were void. This decree had the force law. See *Legislacion Mexicana o colleccion, etc.* (Statutes at Large of Mexico), at date.*

The Gadsden treaty was concluded December 30, 1853, and proclaimed June 30, 1854 (Pub. Domain, p. 136). Hence this attempted alienation of public lands was by the Republic declared void before she parted with the sovereignty, and this law is of binding force upon the courts of the United States. July 7, 1854, Santa Ana issued another decree that all alienations of lands by the States should be submitted to the Supreme Government for revision, without which they should be of no value or convey any property. December 3, 1855, Alvaras, president *ad interim*, issued a decree abrogating those decrees of Santa Ana and declared the titles valid. In 1857, in the constitutional convention, the question was submitted to the chief judge of Mexico whether the public lands had or had not ever been the property of the Supreme Government, and whether the States had ever power of alienation. In a long opinion he held that the unoccupied lands, upon the attainment of independence, became the property of the Supreme Government, and that they have ever continued to be so, and that the States or officers of the States never had the power of alienation. Such has been the highest authority in Mexico. The Gadsden treaty was ratified with the first decree of Santa Ana in

* These laws are comprised in nineteen volumes and the laws appear in the order of their date and contain all the laws of Mexico.

full force, and I insist that decree binds us and no decree or action after by Mexico can alter it. At least it is strong persuasive authority.

Galvan's Ordnanzes de Terras y. Aguas, page 94 (p. 119, 6th ed.) of the act August 4, 1824, says it granted to the States the revenues which came from the sale of lands, but did not authorize the sale of lands by the States. On the next page he enumerates the laws for the sale of public lands. These laws are all special grants to individuals and meritorious soldiers down to August 18, 1824, which is the first general law for the disposal of public lands. These laws he gives in full. All are based upon the assumption that the Supreme Government alone has power to dispose of the public lands. He does not give the act of August 4, evidently believing it not to bear upon the subject of which he treats, viz, the land laws. He wrote in 1851.

The Republic of Texas vs. *Thorn* (3 Tex., 499), and *Chambers* vs. *Fisk* (22 Tex., 507), have been cited as against this view. In considering these cases it must be remembered that Texas was always impatient of the central government and was deeply imbued with ideas of independence, and the rights of the state were ever asserted to an extreme. As an independent Republic she owned her public lands, and in coming into the Union she retained them. The court, in the former case, reviews a case begun under the Republic. The court holds:

> That the right of eminent domain over the public lands was originally vested in the federal government of Mexico is, perhaps, not now subject to question. The confederacy of the Mexican States was not

formed, originally, by a constitutional compact between several separate independent States, nor by a grant of powers originally vested in the several provinces which afterwards constituted the States of the Union.

The court shows that control over the public lands was vested in the central government, whether vested in the Crown, the sovereign juntas, the Emperor Iturbide, or the other authorities which succeeded. Hence the court excludes all grounds upon which the State may claim to control the public lands, except the national colonization laws of August 18, 1824, as the State has recognized that law; nor has she claimed any right to control the same except by virtue of that law. The court then holds, however, that by that law was relinquished to the States lands within their borders, subject to certain reservations embodied in the law. Colonization on the border was prohibited, and no more than 11 leagues were to be granted.

In 1825 Texas adopted a colonization law and assumed to cede certain lands. In 1830 the Federal Government enacted restrictions upon the operation of this law. From that time on until Independence there was a constant conflict of legislation between Texas and the supreme government, which is reviewed in that case, and the court holds that as it did not appear that the supreme government had assented to the grant within 20 leagues of the border, the title could not stand. This case is authority for what I have here urged upon the court, namely, that before August 18, 1824, there was no law in Mexico for the disposal of public lands. Texas never claimed in that bitter controversy that the act of August 4, 1824,

granted the lands to the States. That ground was not urged. But she made claim under the colonization act. The claim there was equally groundless, and was only asserted, finally, by independence.

Chambers vs. *Fisk* is a curiosity. It ignores the act of August 18, 1824, entirely. Says that the limitations of the act to 11 leagues did not prohibit the State of Texas from granting more. It is put on high ground. It insists that as the State of Texas has done it, and as the supreme government has not annulled it, the grant must stand. That the land in that case was given to a judge for a salary. That the State was required by the Federal Constitution to establish a judiciary.

The constitution of Texas did establish a judiciary. The supreme constitution authorized the central government to legislate *without intermeddling with the interior administration of the States.* It was necessary to pay a judge, and the State was empowered to pay him in land. This is the argument and the decision. It is more like a revolutionary proclamation than the opinion of a court, and will—must be—disregarded. This court, in the Vallejo case and the Workman case, has taken an entirely different view. Texas stands alone in this opinion. But this case does not help appellant here. This grant can by no means be brought within it.

In *Evans* vs. *Hardgrove* (11 Tex., 209), the court holds:

> There is not the slightest vestige of proof, either written or verbal, that the political chiefs of the department of Texas had, under the authority of Spain or Mexico, until after the colonization laws of 1825, any power to grant or confirm land titles.

This is the doctrine we maintain, that granting of land must be based upon laws of the Supreme Central authority. If those laws are construed to authorize the States to cede, the State must legislate to effect it. This grant was made clearly without an act of the supreme central government or the State of Sonora. It is clear, also, that the supreme government never parted with control over public lands, and that by the act of August 18, 1824, it authorized the States to make rules and regulations as to colonization and no more; and possibly the act of August 4, 1824, gave the revenues derived from sales of public lands to the States. They went no farther.

If the court please, I have done. I have presented here the results of years of investigation and study into the jurisprudence of a foreign State in a strange tongue at first. The obstacles to this study are many, and the rewards not satisfactory. If, however, I shall have aided the court to prevent a monstrous wrong, I shall be content.

Very respectfully,

WM. H. BARNES,
Special Counsel for the United States.

Appendix I.

NOGALES, ARIZ.,
July 13, 1892.

DEAR JUDGE: I am in receipt of your esteemed favor of the 12th instant, and hasten to reply to the same. You ask:

First. What is the "construction in Mexico of a grant of 4 sitios de ganado mayor at the point, La Zanja," and

Second. "If the expediente shows that lines two or more leagues in length from that point to the four cardinal points were measured to natural or artificial land marks, and then the lines around the outside of these exterior points were measured inclosing more than 16 sitios, whether in such an expediente the boundary so measured would be construed as the land granted, or whether 4 sitios would be the limit, and if so, what for?"

To reply to the first question: "Four sitios de ganado mayor at the point, La Zanja," would be a square of which the geometrical center is the point, La Zanja, and would be measured as follows: Beginning at the center point, La Zanja, thence north 100 cords of 50 varas each or 5,000 varas to the north center monument; from same center south 100 cords to the south center monument; from same center east 100 cords to the east center monument; from same center west 100 cords to the west center monument, thus forming a cross, the monument at each point of which is called a "*mojonera cruz*" or cross monument. From either of the cross monuments—the north one for in-

stance—east 100 cords to the northeast corner monument; thence south 100 cords to the east center monument; thence same course south 100 cords to the southeast corner monument; thence west 100 cords to the south center monument; thence same course west 100 cords to the southwest corner monument; thence north 100 cords to the west center monument; thence north, same course, 100 cords to the northwest corner monument; thence east 100 cords to the north center monument, the place of beginning, containing 100,000,000 square varas or 4 modern Mexican square leagues or 4 sitios de ganado mayor.

It is not necessary that the "*punto centrico*" or center point, from which the survey begins, should be the geometrical center of the tract. Where there are adjoining tracts that do not allow of equality of measurements to the four cardinal points, or where the nature of the ground, or the wishes of the locator make it necessary or permissible, any point within the perimeter may be taken as a center for purposes of survey. Escriche, in his Dictionary of Legislation and Jurisprudence (Diccionario de Legislacion y Jurisprudencia), page 202, Second Part, defines a sitio de ganado mayor as follows:

> *Sitio de Ganado Mayor.*—The figure of a *sitio de ganado mayor* is a square, each of whose sides are five thousand Mexican varas. Two of these sides should have the direction of east to west, and as a necessary consequence the other two should be situated from north to south. The distance there should be from the center of said sitio to each one of its sides, traveling directly towards the points of the horizon, which are denominated cardinal, and are east, west, north, and south, is two thousand five hundred varas; that which should be measured from the same center to each one of the four right angles of said sitio should have three thousand five hundred and thirty-five and a half varas; and that which

should be measured from one of its angles to the other angle opposite, should be seven thousand and seventy-one varas.

If use is made of the cord of fifty varas in these measurements, each one of the sides of the *sitio de estancia de ganado mayor* should have one hundred cords; from the center to each one of said sides there should be fifty cords; from the same center to each one of the angles there should be measured seventy cords and thirty-five and a half varas, and from one angle to the other opposite there should be one hundred and forty-one cords and twenty-one varas.

The area or surface of a sitio de ganado mayor is twenty-five million square varas, which result from squaring the number of varas which one of its sides has, that is, from multiplying the number 5,000 varas by itself.

In reply to your second question, I would say that in the case supposed therein the "boundary so measured" would not be construed as inclosing the land granted. The land granted would be four sitios and no more, and the four sitios granted would be those about the center point, La Zanja, and measured as described in my reply to your first question and in Escriche's definition of a sitio de ganado mayor.

In my ten years' experience surveying in Mexico under concessions, I and all other surveyors engaged in this work have always proceeded as follows: I summon the owner to appear before me with his titles, maps, etc., to show me his monuments or corners and to be present during my survey of his land. I examine his titles carefully and make an abstract thereof. He shows me his monuments and I survey the land accordingly, exactly as he claims it, and without any question. I then proceed to identify and locate the original "*punto centrico*" or center

point, to the best of my own judgment, relying on the description in the expediente and other evidence, if any there be.

I represent the tract on my map as the owner claims it and as I have surveyed it. I locate thereon the center point and about it plat the "*cabida legal*," that is, the quantity described in the title and covered thereby. This latter is known as the "*cabida legal*," or the part covered by lawful title, and the balance or difference between area claimed and area covered by title is the *demasias* or overplus, provided the land had been sold *ad mesuram*. If it had been sold *ad corpus*, then the whole tract would be "*cabida legal*," and there would be no overplus. This overplus is public land. See Royal Decree, October 15, 1754, Section 7, and law of July 22, 1863, Articles 5, 6, 7 and 8. See also Report of the Minister of Public Works to the Mexican Congress, October, 1885, from which I quote:

> Document No. 10 contains a detailed statement of the contracts made for the survey of overpluses (demasias).
>
> On this point I am going to take the liberty, at the risk of fatiguing the Chamber, of being a little more extensive, as much because it is the point most attacked by the deputy who called for this report as because, in my judgment, it is the one about which the least is known.
>
> On these *demasias* the law of the 22nd of July, 1863, treats in its Arts. 5, 6, 7, and 8.
>
> The executive has considered *demasias* under two classes—the excesses of lands, which excesses are protected by title, although their boundaries enclose a greater extension, and those that do not have that circumstance, because their titles cover an extension less than that they hold, but which are protected by possession in conformity with law.

The first are those held by virtue of the fact that when the titles were issued, either from special circumstances of the places where they were situated, or from lack of professional surveyors to make the survey, or from lack of instruments of precision, certain boundaries were marked out, covering only a certain quantity of land, which, when surveyed, turns out to be much larger than that described in the titles.

These lands are further divided into two classes: those which were sold *ad corpus*, that is to say, all the extension included within certain boundaries, which are lawfully held, and those which are sold *ad mesuram*, that is to say, that within indicated boundaries a certain extension of land was sold, which should be corrected at some time, as is now being done.

I call the attention of the Chamber to the fact that in all these titles there is the clause that said lands were sold without prejudice to the King, which proves in an obvious manner that only a fixed extension was sold and that the overplus that results, when the surveys are corrected, belonged to the Crown, and now, as a logical and necessary consequence, to the nation.

The second class are those lands their owners have occupied in good or bad faith, extending the boundaries of their property without any other right than that of possession.

In both cases the nation has a right to those *demasias*, and it is its unavoidable duty to investigate them in order to profit by that part of the public wealth, in accordance with law.

To carry out the investigation of said *demasias*, it is necessary to comply with all the provisions of said laws of the 22d of July, 1863, and 15th of December, 1883, and to take all the legal steps laid down in the same. Consequently no kind of abuses can be committed, and for the same reason there should be

no alarm among property owners, of which so much has been said in the body of that chamber. It is possible, nevertheless, that some owners may have become alarmed, but without any doubt they are those who occupy lands and are not disposed to make use of the right given them by the law of the 23d of July, 1863, in its Arts. 5 and 6; or because they improperly interpret the investigation of the companies, who act in representation of the Government, inasmuch as those who hold lands in good faith, on the contrary, have seen in these acts of the executive the lawful and honorable means of legalizing their properties, avoiding conflicts hereafter, and giving their lands a real value, which their properties could not have when their titles were doubtful. These assertions are fully proved by the applications presented to the Department of Public Works by various owners, in which they themselves spontaneously denounce (file on, locate) the *demasias* they have been holding, and ask to enter into an arrangement with the Government.

Authenticated copies of said application accompany this report in Document No. 11.

All these facts demonstrate that the Government does not attack private property, as has been stated in that Chamber, but that, on the contrary, it respects it and endeavors by lawful means to legalize it, and by these means to secure an increase in the value of private property, and moreover a notion of what legitimately belongs to it.

Wherever I have found land, within boundaries claimed, in excess of that covered by title, I have reported the facts to the Government. This latter has, in every case, taken possession of such overplus lands and has sold them either to the holders themselves or to the concessionary companies. Every square inch of land in each and all of the land grants in Arizona, over and above the amount de-

scribed in their titles, if said titles are valid, is *demasia*, overplus, and as such is now and always has been public land, regardless of where the monuments were placed originally and of the distances measured and given in said titles, unless the land was sold *ad corpus*, in which case there is no overplus.

I am unable to give any decrees or decisions of the courts of Mexico touching the questions you propound, as all such matters are decided by the minister of public works. The decisions of their courts never have the force of precedents, every case being decided on its own merits.

I believe, judge, I have complied with your request, and with the assurance that I am ever ready to serve you and the settlers you represent, I am,

Very sincerely, yours,

HENRY O. FLIPPER.

Judge WM. H. BARNES,
Tucson, Ariz.

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Appendix II.

DECREE.

Classification of general and special revenues.

The sovereign general constituent Congress of the United States of Mexico has seen fit to decree as follows:

(1) Such import and export duties as have already been or may hereafter be established, under any denomination, in the ports and on the frontiers of the republic, shall form part of the general revenues of the federation.

(2) Also the import duty of 15 per cent, which shall be collected in the same ports and on the same frontiers, and on the tariff prices increased by one-fourth of foreign goods which, by reason of this duty, shall be conveyed to any point of the interior without payment of excise duty.

(3) The revenue derived from tobacco and powder.

(4) The excise paid on tobacco in the districts in which it is cultivated.

(5) The revenue derived from the postal service.

(6) That derived from lotteries.

(7) That from salt mines.

(8) That from the territories of the federation.

(9) National property, in which are comprised that of the inquisition and the temporal property of the clergy, and any other rural or city property that belongs or may hereafter belong to the exchequer.

(10) Buildings, official establishments, and lands adjoining and appertaining to the latter, which belong or have belonged to the general revenues, and those which

have been charged to two or more of our former provinces, shall be subject to the disposal of the government of the federation.

(11) Revenues not comprised in the preceding articles shall belong to the various States.

(12) The credits and debits of the revenues belonging to the various States shall be considered as credits and debits of the general revenues.

(13) In the peninsula of Yucatan export duties levied upon domestic production shall not be included in the general revenue, nor shall any import duty be levied.

(14) The sum of $3,136,875 shall be apportioned among the states of the federation, this being the amount which it is estimated will be lacking in order to meet the general expenditures.

(15) The appointment shall be, for the present and until data shall be furnished showing the true proportion, as follows: The State of Occidente, $53,125.

(16) The several States shall pay, every month or every fortnight reckoned from the day on which they shall receive their revenues, that portion of the contingent which may be due for the time already expired, and the Government shall be at liberty to select either of the two terms, and even to prolong them, when the particular circumstances of a State may require it.

(17) On the 1st day of September next the States shall receive the revenues and offices belonging to them, and the necessary measures shall be taken for the final settlement of accounts.

(18) When the States shall present exact statements of their wealth and population, the present apportionment shall be rectified, and, to some, shall be refunded the amount what they have paid in excess of what was done, while others shall make good the deficiencies in their previous payments.

(19) The Government shall take measures to cause the import duty to be collected with as little delay as possible, and shall so arrange matters that, when the land customs dues have been paid, foreign goods in port (en escala), or on the way, shall not be exempted from the payment of excise duty, but the Government shall cause the excise duty to be collected thereon, with the due separation of the custom-houses.

(20) Goods of Mexican production shall not pay more than one excise duty in the State where they are consumed.

(21) Consequently, if any excise duty shall have been collected upon any articles of Mexican production, and that article shall afterwards be sent to another State, the duty collected upon it shall be refunded.

(22) One third of the contingent to be contributed by the States shall be deducted from the first year.

Let it be understood, etc.

MEXICO, *August* 4, 1824.

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MEXICO, *August* 4, 1824.

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146 U.S. 533

Office Supreme Court U. S.
FILED.
OCT 26 1892
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

COLIN CAMERON, APPELLANT,
vs.
THE UNITED STATES.
No. 42.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

COLIN CAMERON, APPELLANT,
vs.
THE UNITED STATES. } No. 42.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR THE UNITED STATES.

I.

This was an action brought under the act of February 25, 1885 (23 Stat., 321), entitled "An act to prevent unlawful occupancy of the public lands." Although they has been set out in other briefs on file in this cause, I venture to quote here the first two sections, which are as follows:

CHAP. 149.—An act to prevent unlawful occupancy of the public lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all inclosures of any public lands

in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right, as above specified, as to inclosure, is likewise declared unlawful and hereby prohibited.

SEC. 2. That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated, showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by governmental subdivisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name can not on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district or circuit court, or territorial district court in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any

United States district or circuit court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employé having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case, if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.

I assume that this action was an action in the nature of a common-law action. It certainly has none of the elements of an equity suit. The jurisdiction given by the second section "to hear and determine proceedings in equity by writ of injunction to restrain violations of the provisions of this act" is confined to that remedy, and is not designed to give character to all the proceedings authorized by the act. An inspection of the record, and of the briefs on file, clearly shows that all parties, as well as the court, rightly regarded the action as a common-law action.

Assuming that they were correct in so doing, the first question to which the attention of the court is invited is, was there such a trial of said cause below as raises any question for review in this court.

II.

In this case the trial was had in the District Court of the First Judicial District of the Territory of Arizona without the intervention of a jury, and, so far as the record discloses, without any written stipulation waiving a jury filed with the clerk.

In behalf of the appellee it is insisted that the Supreme Court of the Territory of Arizona could not properly consider any of the matters raised by the bill of exceptions, nor can this Court do so.

All that the former court could do was to affirm the judgment of the District Court, and all this Court can do, it is submitted, is to affirm the judgment of the Supreme Court of Arizona.

These propositions make it proper for us to examine the mode of trial in, and jurisdiction of, the courts of Arizona, together with the methods of reviewing their decisions in this Court.

Section 1908, Revised Statutes, provides:

> The judicial power in Arizona shall be vested in a supreme court and such inferior courts as the legislative council may by law prescribe.

Section 1865 is as follows:

> Every Territory shall be divided into three judicial districts, and a district court shall be held in each district of the Territory by one of the justices of the supreme court, at such time and place as may be prescribed by law; and each judge, after assignment, shall reside in the district to which he is assigned.

Section 1910, Revised Statutes, is as follows:

> Each of the district courts in the Territories mentioned in the preceding section shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and the first six days of every term of the respective district courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the supreme court of each Territory, as in other cases.

Section 1909, Revised Statutes, provides:

> Writs of error and appeals from the final decisions of the supreme court of either of the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming shall be allowed to the Supreme Court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, except that a writ of error or appeal shall be allowed to the Supreme Court of the United States from the decision of the supreme courts created by this Title, or any judge thereof, or of the district courts created by this Title, or of any judge thereof, upon writs of habeas corpus involving the question of personal freedom.

An act entitled "An act concerning the practice in Territorial courts, and appeals therefrom" was passed April 7, 1874. (18 Stat., pt. 3, p. 27.)

Omitting the recital clause concerning the doubts which had arisen whether the common law and chancery jurisdiction must be exercised separately, the act is as follows:

That it shall not be necessary in any of the courts of the several Territories of the United States to exercise separately the common law and chancery jurisdictions vested in said courts; and that the several codes and rules of practice adopted in said Territories respectively, in so far as they authorize a mingling of said jurisdictions or a uniform course of proceeding in all cases whether legal or equitable, be confirmed; and that all proceedings heretofore had or taken in said courts in conformity with said respective codes and rules of practice, so far as relates to the form and mode of proceeding, be, and the same are hereby validated and confirmed: *Provided*, That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.

SEC. 2. That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe: *Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, hereto-

fore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal: *And provided further*, That the appellate court may make any order in any case heretofore appealed, which may be necessary to save the rights of the parties; and that this act shall not apply to cases now pending in the Supreme Court of the United States where the record has already been filed.

This act is incorporated into the Revised Statutes, 1878, as follows:

SEC. 1868. The supreme courts and the district courts, respectively, of every Territory shall possess chancery as well as common law jurisdiction.

SEC. 1869. Writs of error, bills of exception, and appeals shall be allowed, in all cases, from the final decisions of the district courts to the supreme court of all the Territories, respectively, under such regulations as may be prescribed by law; but in no case removed to the supreme court shall trial by jury be allowed in that court.

As provided by the act of March 2, 1877 (19 Stat., 268), as amended by the act of March 9, 1878 (20 Stat., 27), the original act controls and not the revision, and I therefore assume that in the Territorial courts the common law actions are to be tried by jury as in the circuit courts of the United States. I make this suggestion without reference to any question as to how that right may be waived.

In the circuit and district courts of the United States issues of fact are to be tried by jury, except in equity, admiralty, and maritime cases. (R. S., 566, 648.)

The seventh amendment to the Constitution of the United States provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of common law.

Section 1891, Revised Statutes, provides:

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States.

From these legislative acts I conclude that the district courts of the Territory of Arizona were, as to the action at bar, common law courts, exercising as to this case, which is one arising under the laws of the United States, the same powers as a district court of the United States trying a common law case, and bound to try it in accordance with the settled practice and procedure of such common law courts. It seems also that what is and what is not a judicial act in a district court of a Territory must be determined by applying the same tests, in view of the provisions of sections 1910 and 1891 *supra*, as would be applied to the actions of district and circuit courts of the United States.

The case then falls within the principles announced in *Rogers* v. *United States* (141 U. S., 548, 554, 556), where it is said:

> There was no statute in existence which provided for the trial in the District Court by the court with-

out a jury. It is provided by section 566 of the Revised Statutes that "the trial of issues of fact in the District Courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury." The provision for waiving a jury, in section 649 of the Revised Statutes, applies only to the Circuit Court, as does also a special provision of section 700 in regard to the review by this court of a case tried in the Circuit Court by the court without a jury. There are no similar provisions in regard to trials without a jury in the District Courts to those found in sections 649 and 700 in respect to Circuit Courts.

It is true that, in the District Court, in a suit otherwise triable by a jury, the parties may, by stipulation, waive a jury and agree on a statement of facts, and submit the case to the court thereon for its decision as to the law (*Henderson's Distilled Spirits*, 14 Wall., 44, 53). That might have been done also in the Circuit Court without any statute to that effect (*Campbell* v. *Boyreau*, 21 How., 223, 226, 227). This, however, is not the finding of issues of fact by the court upon the evidence. The provisions of sections 649 and 700 relate wholly to such finding, and not at all to the action of the court upon an agreed statement of facts.

In the present case the Circuit Court could not properly consider any of the matters raised by the bill of exceptions; nor can this court do so. All that the Circuit Court could do was to affirm the judgment of the District Court; and all that this court can do is to affirm the judgment of the Circuit Court. The Circuit Court had jurisdiction by its writ of error, and this court has jurisdiction in the present case.

The authority given to the Circuit Court by section 633 of the Revised Statutes is merely to reëxamine the

final judgments of a District Court in civil actions. The same authority was given to this court in respect to judgments of the Circuit Court before the act of March 3, 1865 (13 Stat., 501, § 4), the provisions of which are now embodied in sections 649 and 700 of the Revised Statutes. The extent of that authority was settled by the case of *Campbell* v. *Boyreau*, before cited. That was a suit at law in a Circuit Court. The whole case having been submitted to the court upon the trial, and a jury having been expressly waived by agreement of parties, evidence was offered on both sides. The court found the facts, and then decided the questions of law arising upon such facts, and gave judgment for the plaintiff. The defendants sued out a writ of error from this court. There were in the record bills of exceptions which showed exceptions by the defendants to the admissibility of evidence and exceptions to the construction and legal effect which the court gave to certain instruments in writing. But this court held that, in the mode of proceeding which the parties had seen proper to adopt, none of the questions, whether of fact or of law, decided by the Circuit Court, could be reëxamined by this court upon a writ of error. The opinion of this court, delivered by Chief Justice Taney, cited to that effect *Guild* v. *Frontin* (18 How., 135); *Suydam* v. *Williamson* (20 How., 427, 432), and *Kelsey* v. *Forsyth* (21 How., 85), and said: "The finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and can not be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an

arbitrator. And this court, therefore, can not regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court can not regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit Court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our reëxamination, its judgment must be presumed to be right, and on that ground only affirmed."

In *Reynolds* v. *United States* (98 U. S., 145, 154) this Court held that by the sixth amendment to the Constitution a person on trial for a criminal offense in a Territory was entitled to an impartial jury. If the sixth amendment applies to the Territories it is difficult to assign any reason why the seventh does not also.

In view of the provision that all laws not wholly inapplicable shall have the force and effect within the Territories as elsewhere within the United States, and that a Territorial district court has in such a case as the one at bar the same jurisdiction as a circuit court of the United

States, I venture to suggest that sections 649 and 700, Revised Statutes, apply to Territorial district courts. Such seems also to be the meaning of section 702, Revised Statutes, which is as follows:

> The final judgments and decrees of the supreme court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal, *in the same manner and under the same regulations as the final judgments and decrees of a circuit court.* * * *

If correct in these suggestions the case at bar is within the decisions of this court in *Spalding* v. *Manasse* (131 U. S., 65); *Bond* vs. *Dustin* (112 U. S., 604); *Dundee Mortgage Co.* v. *Hughes* (124 U. S., 157); *Boogher* v. *Insurance Co.* (103 U. S., 90, 95); *Kearney* v. *Case* (12 Wall., 275).

The record in this case contains the following with reference to the agreement to try the case without the intervention of a jury:

On page 6, from minute order of April 18, 1887:

> * * * this being the day set for trial, the trial began before the court sitting without a jury.

On page 8, from the judgment:

> * * * A trial by jury having been expressly waived by the respective parties, the cause was tried before the court sitting without a jury.

On page 9, from the findings of fact by the court and decree:

> * * * A trial by jury was waived by the respective parties and said action was tried before the court without a jury.

On page 30, from the bill of exceptions:

> * * * A trial by jury having been expressly waived by the parties, and thereupon the following proceedings were had.

These or equivalent statements were contained in the records of the cases above referred to, and it must be regarded as settled in this court that they fail to show a compliance with the statute referred to.

It is true that the act of April 7, 1874 (*supra*) allows only the statement of the facts of the case in the nature of a special verdict to be brought to this court instead of the evidence at large. But this in no way impairs the right of trial by jury in the original court. As was said in *Rogers* v. *United States*, *supra*:

> There was no statute in existence which provided for the trial in the district court without a jury. * * * "The finding of issues of fact by the court upon the evidence is altogether unknown to a common-law court, and can not be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator."

As there held, it was the duty of the Supreme Court to affirm the judgment of the district court.

It may be said that the Supreme Court of Arizona was required to find the facts, and have done so in the following entry (R., 75):

> In the above-entitled cause the court finds the facts to be the same as found by the lower court and as appears in the record of this cause on file herein, and the said findings are hereby adopted as the findings of this court herein.
>
> APRIL 19, 1889.
>
> JAMES H. WRIGHT,
> *Chief Justice of the Supreme Court of Arizona.*

But the point is that the court below had no power to find issues of fact from the testimony of witnesses heard without a jury.

In the case of *Rogers* v. *United States* (*supra*) there was a written stipulation waiving a jury. The judge made specific findings as in this case. There was also an agreement waiving a jury in *Campbell* v. *Boyreau* (21 How., 223, *supra*). The conclusion reached, as already quoted, was that "as this court can not regard the facts found by the judge as having been judicially determined in the court below, *there are no facts before us upon which questions of law* may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal."

So there were no facts judicially determined in the district court and consequently there were no facts before the Supreme Court. If, in the cases cited, because of the absence of a jury, no facts existed or could be recognized for any purpose before the appellate tribunal surely here what does not exist can not be adopted or made to exist as judicial facts by order of adoption.

The case is therefore not within the principles announced in *Stringfellow* v. *Cain* (99 U. S., 610); *Cannon* v. *Pratt* (99 U. S., 619); *Neslin* v. *Wells* (104 U. S., 428); *Gray* v. *Howe* (108 U. S., 12), and like cases, where the right of the supreme court of the Territory to adopt the finding of facts by the court below is recognized. These cases were all either equity cases, or special proceedings of such a nature that a right to trial by jury did not exist, or was supposed not to exist, and the court had no occasion to and did not determine whether the territorial supreme court could adopt a finding of facts made by the district court in a law case where no jury was had, or waived in the manner provided by law.

In the absence of such a trial or waiver the language of this court in *Idaho and Oregon Land Co.* v. *Bradbury* (132 U. S., 509, 514), seems applicable.

> The provisions of this act, [April 7, 1874] permitting a writ of error "in cases of trial by jury" only, evidently has regard to a trial by jury, as in an action at common law, in which there is and must be a trial by jury, and the court is not authorized to try and determine the facts for itself, unless a jury is waived by the parties according to statute.

That was a suit to enforce a mechanic's lien which the court considered "in the nature of a suit in equity." This court said, p. 515:

> The district court so treated the case, as is evident from its having made its own findings of fact on some of the questions at issue, and having based its decree, not upon the findings of the jury, but upon the proofs produced at the final hearing—*neither of which would it have been authorized to do, had the suit been*

in the nature of an action at common law, the parties not having waived a trial by jury. (*Morgan* v. *Gay*, 19 Wall., 81; *Hodges* v. *Easton*, 106 U. S., 408; *Baylies* v. *Travellers' Ins. Co.*, 113 U. S., 316; Act of Congress of April 7, 1874, c. 80, § 1, 18 Stat., 27; Idaho Code of Civil Procedure, §§ 361, 389.)

It is insisted that this action is in the nature of a common-law action; that there should have been a jury trial unless the right thereto was waived in accordance with the statute; that the record fails to disclose such trial or waiver, that therefore there was nothing before the Supreme Court of Arizona upon which it could base its findings of fact, or that was subject to appeal; and that the judgment was properly affirmed in that court.

It is confidently submitted, therefore, that there is no question presented by this record arising on the trial of the cause, and that the decree below should be affirmed.

There has been some question as to the proper construction of the act of April 7, 1874 (18 Stat., 27), with reference to the finding "of the facts of the case in the nature of a special verdict" required by that act. It would seem plain that a full bill of exceptions containing all the evidence goes from the district court to the supreme court of the Territory. If an appeal or writ of error is taken from the action of the latter court to this court it is the duty of the supreme court of the Territory to make up its special verdict just as under the last clause of Rule 8, prescribed by this court, the record is shortened and simplified in the class of cases named.

No question would, therefore, be made upon the right of the court below to adopt the findings in the district

court, *if there had been judicial findings there.* As we have seen, the act of the district court in trying the case without the intervention of the jury, and without a stipulation as to the facts, was not a judicial act. It is therefore insisted that the order of adoption (R., 75) was a nullity, as there was and would be no court without a jury in a common-law case.

III.

In the argument of this case, it is not deemed necessary in behalf of the United States to discuss those assignments of error which relate to the admission or rejection of testimony in the original trial court, for the reason that the Supreme Court of the Territory of Arizona has made no certificate or statement regarding the reservation of any such question and has contented itself with adopting the findings of fact as made by said trial court. This position is taken upon the authority of the case of *Neslin* vs. *Wells* (104 U. S., 428–429), where the court uses the following language:

> Under the second section of the act of Congress of April 7, 1874, c. 80 (18 Stat., pt. 3, p. 27), concerning the practice in Territorial courts and appeals therefrom, as explained in *Stringfellow* vs. *Cain* (99 U. S., 610), the present appeal rightly brings into review the decree of the Territorial Supreme Court, affirming the decree of the District Court; but we are not at liberty to consider anything as embraced in the statements of facts, required by the statute, except the special findings of the District Court, adopted by the Supreme Court in its general judg-

ment of affirmance. This excludes the consideration of the exceptions taken in the District Court in the course of the trial, and noted in the statement filed in that court as the basis of the motion for a new trial, and leaves as the sole question for determination here, whether the facts as found justify the decree sought to be reversed.

The following argument, therefore, is limited to a consideration whether or not the findings of fact in the court below justify the decree that was rendered.

IV.

The findings of fact in the court below (Rec., pp. 8–29) show that there was granted in 1865 to one Ramon Romero "and citizens of Santa Cruz" four square leagues of land comprised in the place called "San Rafael de la Zanja," situated on the head waters of the Santa Cruz River, on or near the boundary line between Mexico and the United States, and mostly in that portion of the jurisdiction of the presidio of Santa Cruz which is now included in the Territory of Arizona. Possession was taken of this grant, and appears to have been continuously held to the present time at the point—San Rafael de la Zanja. The appellant, Colin Cameron, had succeeded before the commencement of this action, or the erection of the fence complained of, to all the right, title, and interest which Romero ever had in or to said grant. Nothing is found concerning the interest of his fellow-grantees, or the nature or extent of their original or present interest.

It is also found that prior to the commencement of this action or the erection of the fence complained of, a ques-

tion had arisen as to the extent of this grant, the grantees claiming that they were not confined to four square leagues of land, but were entitled to go to the exterior boundaries of the description erroneously said to have been made, as is insisted, in behalf of the Government in "the expediente" from the Mexican Government. With a view of determining this question, it is shown that a petition had been filed under the act of Congress of July 22, 1854, with the surveyor-general of the Territory of Arizona, asking that that officer recommend to Congress for confirmation all the land embraced in said exterior boundaries as described in the *expediente*. (Rec., p. 9.)

That officer found the grant to be a valid one, but recommended its confirmation only to the extent of four square leagues, and had caused a survey of the four square leagues to be made. (Rec., p. 9.) Congress had then taken no action. The claim and report were still pending before that body (Rec., p. 29), but at this writing have received no recognition.

The proceedings before the surveyor-general, together with the *expediente* and grant under which appellant pretends to claim, were introduced by the defendant to show that the fence complained of was within the exterior boundaries, and it is found by the court below that such is the fact, in the following language (R. 28):

> That the said fence so maintained by the defendant is within the exterior boundaries, as said boundaries are recited as measured in said expediente, and as claimed in the petition filed before the surveyor-general; that the said fence is a mile and a quarter south of the northern boundary and four miles west of the eastern boundry of land recited as measured in

said expediente and as claimed in the said petition, but that it is outside of the four square leagues so as aforesaid caused to be measured by the said surveyor-general, and that it is outside of the four square leagues cornering on the place called La Zanja, the starting point of measurements recited in said expediente.

It is found also (R. 29)—

That Colin Cameron, the defendant, had succeeded, before the commencement of this action or the erection of said fence, to all the right, title, and interest which Ramon Romero ever had in or to said grant, and before and at the commencement of this action was, and ever since has been, in possession of all buildings on the said four square leagues so as aforesaid caused to be surveyed by said surveyor-general, and is now claiming and has always claimed the title to the possession of all the land embraced within the exterior boundaries as measured in said expediente, and that he has occupied and used all of said land within said exterior boundaries by grazing of cattle upon said lands, claiming title to said land, and that he now has all of the right, title, and interest which Ramon Romero ever had or held in or to said alleged grant.

And,

That said lands are in the territory acquired by the United States from the Republic of Mexico under the Gadsden purchase.

Construing the grant in connection with these facts the district court reached the following conclusion of law (R. 29):

And as the conclusion of law from the foregoing facts the court adjudges and decrees that the place where

> the inclosure was made was public lands, and that the inclosure was therefore unlawful, and that the court further adjudges and decrees that the said fence be removed by the defendant within five days from this date—22d day of October, 1887—and that if the defendant fails to remove said fence within said time the same be removed by the marshal of this Territory at the cost of said defendant.

It will be seen that the question of the correctness of this conclusion depends upon the question whether under the Mexican grant the defendant could "in good faith" claim not four square leagues, but sixteen square leagues.

It is found that the original grantors only paid for four square leagues. (Rec., pp. 25, 27.)

The surveyor-general in his reports states that the Mexican surveyors measured a tract of sixteen square leagues (Rec., p. 48). The court, construing the papers introduced in evidence, held that the grant only entitled the grantors to four square leagues, and as the fence complained of was not within this body, ordered its destruction.

The grant was specific and definite of four square leagues. There is no ambiguity. Therefore there is no occasion to refer to the *petition or diseño.*

The language used in the grant makes it plain that a certain quantity was the object of the grant, and not a tract within certain boundaries, nor a certain place or rancho by specific name. In other words, it was a grant of a definite quantity at a designated place.

> * * * I grant the four square leagues * * * comprised in the place called "San Rafael de la Zanja." * * * Don Ramon Romero and the citi-

> zens of Santa Cruz are also required to confine themselves within their respective limits, which are to be designated by monuments of stone and lime * * * and the district of Arizpe shall not allow the said interested parties nor their successors to be in any manner molested in the free enjoyment of the property, dominion, and possession of the above mentioned four square leagues of land comprised in the place called "San Rafael de la Zanja" * * * (Rec. pp. 27, 28.)

The fact that four square leagues only were appraised and paid for has been noted.

The grant, as above quoted, shows that specific boundaries or "respective limits" were to be thereafter fixed by proper "monuments of stone and lime."

The only thing then definitely fixed and granted was the quantity measured from a certain place.

In *Fremont* v. *The United States* (17 How., 542, 545, 546) the grant was—

> For the tract of land known by the name of the Mariposas to the extent of ten square leagues, within the limits of the Snow Mountains, and the rivers known by the names of the Chanchilles, of the Merced, and the San Joaquin. * * * The tract of land granted is ten sitios de ganado mayor (ten square leagues), as before mentioned. The magistrate who may give possession shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for proper uses.

This was held (p. 558) to be a grant of the quantity mentioned within the limits described, citing *Rutherford* vs. *Greene's Heirs*, 2 Wheat., 196.

It is said in *Higueras* v. *United States* (5 Wall., 827, 833, 334):

> Concessions or grants of land by Mexican governors were of three kinds, and in some respects the rules applicable to their construction are widely different. They were concessions or grants by specific boundaries, where, of course, the donee is entitled to the entire tract or concession, or grants by quantity, as of one or more leagues of land situate at some designated place, or within a larger tract described by what are called out-boundaries, where the donee is entitled to the quantity specified and no more, or grants or concessions of a certain place or rancho by some particular name, either with or without specific boundaries, where the donee is entitled to the tract according to the boundaries, if boundaries are given, and if not, according to the extent and limits of the tract or rancho as shown by the proofs of settlement and possession.

That case was of the latter class, the description (p. 830) having no reference to quantity.

In *Alviso* v. *United States* (8 Wall., 337) the grant was of land known as Milpitas, being 1 league in length from north to south and (by the second grant) 1 league in width from east to west.

The court, quoting the above from 5 Wallace, said:

> The grant in the case before us partakes of the two latter classes. It is a grant by quantity, and the claimant is entitled to the amount specified, if that amount can be obtained without encroachment upon the prior rights of adjoining proprietors (pp. 339, 340).

This classification is again repeated in *Hornsby* v. *United States* (10 Wall., 224, 232), where a grant of "nine leagues of the largest size," "situated in the surplus or vacant lands of the ranchos of Don Carlos Weber and Don José de Jesus Bernal, including the lands of the Cerro Colorado towards the valley" (p. 228) is declared to be "a grant by quantity" (p. 235).

In *United States* v. *McLaughlin* (127 U. S., 428) a grant of (p. 441) "eleven square leagues on the Moquelamos River, which bounds on the north with the southern shore of said river, on the east with the contiguous sierras, on the south with the lands of Mr. Gulnak, and on the west with the estuaries of the beach," was held to be a grant by quantity (p. 448) and to be restricted to that extent and not to embrace either fifty or eighty square leagues, the alternative propositions contended for by those claiming under the grant (pp. 448, 449).

Assuming that these cases settle the proposition that the Romero grant covered only the quantity therein described, and is not to be extended so as to embrace 117,000 or 160,000 acres of land, as variously stated, and that these four leagues are to be located in the usual form at the point named, the next question is, will the land in that territory be withdrawn from the public domain because the claimants under the Romero grant made unfounded pretentions to that territory? In other words, can an empire in extent be withdrawn from public settlement and improvement by the action of any person who chooses to assert that his grant, limited to four square leagues in fact, embraces sixteen or sixty?

The statement of the question carries with it the negative answer. The same answer was given to a similar claim in *United States* v. *McLaughlin* (127 U. S., 428, 449, 450, 451); the clearness and emphasis of the answer there furnished leaves nothing to be desired and makes further argument of the question a work of supererogation.

V.

It does not seem necessary to discuss the question when it is incumbent upon the plaintiff to aver and prove a negative, or, in this case, if it was the duty of the Government to aver and prove that the inclosure was of public lands and made by those who neither had nor claimed, in good faith, to have color of title thereto.

It is contended that it was enough to show title to the lands in the Government, and put upon defendants the proof of color or claim of title in good faith.

It is submitted that no well-considered case can be found where proof of a universal, unrestricted negative is required of either plaintiff or defendant. Both negatives and affirmatives, as subjects of proof and matters of human investigation, are restrained or qualified by time or place.

It may be possible to prove that A wore, or did not, a certain garment at a given date or on a certain occasion. On the contrary, it is admittedly and equally impossible to prove that A always wore, or never wore, a certain garment.

The distinction is so clear that it is scarcely made plainer by argument or illustration.

It is recognized in *Colorado Coal Co.* vs. *United States* (123 U. S., 307, 317, 319), where the following language is used:

> It thus appears that the title of the defendants rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the Government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish. It is, indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text writer: "*When the negative ceases to be a simple one—when it is qualified by time, place, or circumstance*—much of this objection is removed; and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative" (Best on the Law of Evidence, Am. ed., Boston, 1883, sec. 270). So also *Ibid.*, sec. 273: "When a presumption is in favor of the party who asserts the negative, it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative." Also *Ibid.*, sec. 276: "This appears from the case of *Doe d. Bridger* v. *Whitehead* (8 A. & E., 571), which was an ejectment by a landlord against a tenant on an alleged forfeiture by breach of a covenant in his lease to insure against fire in some office in or near London, in which it was con-

tended that it lay on the defendant to show that he had insured, that being a fact within his peculiar knowledge. The argument *ab inconvenienti* was strongly urged, viz, that the plaintiff could not bring persons from every insurance office in or near London to show that no such insurance had been effected by the defendant, and *R.* v. *Turner* (5 M. & S., 206), *The Apothecaries' Co.* v. *Bentley* (Ryan & Moody, 159), and some other cases of that class, were cited. But Lord Denman, C. J., in delivering judgment, said: 'I do not dispute the cases on the game laws which have been cited; but there the defendant is in the first instance shown to have done an act which was unlawful unless he was qualified, and then the proof of qualification is thrown upon the defendant. Here the plaintiff relies on something done or permitted by the lessee, and takes upon himself the burden of proving that fact. The proof may be difficult where the matter is peculiarly within the defendant's knowledge, but that does not vary the rule of law.' And in the same case Littledale, J., said: 'In the cases cited as to game the defendant had to bring himself within the protection of the statutes; and a like observation applies to *The Apothecaries' Co.* v. *Bentley*. But here, where a landlord brings an action to defeat the estate granted to the lessee, the onus of proof ought to lie on the plaintiff.' And this ruling has been upheld by subsequent cases. (*Toleman* v. *Portbury*, L. R. 5 Q. B., 288; *Wedgwood* v. *Hart*, 2 Jurist, N. S., 288; *Price* v. *Worwood*, 4 H. & N., 512.)"

Mr. Greenleaf states the rule in equivalent terms. He says (1 Greenleaf on Evidence, sec. 78): "To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party who states it.

> One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, this negative is an essential element in his case." And in sec. 80: "So, where the negative allegation involves a charge of criminal neglect of duty whether official or otherwise, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged."

In this case there is no strong presumption raised by a patent regular upon its face, and which must be overturned to enable the Government to recover. On the contrary, it is admitted that the United States acquired title by the Gadsden purchase, and that the defendants derive no title from the United States. As contended later, the presumptions are that the land purchased is the property of the United States and a part of the public domain. To show that the defendants had no claim or color of title made in good faith would require the United States to prove that the Mexican authorities, or the nations antedating them, never made to any person any disposition of this property through which the defendants in good faith could or did claim. In other words, the Government must prove a simple unrestricted negative not, as noted in the Colorado Coal Co. case, *supra*, "qualified by time, place, or circumstances." A more logical rule is to put upon the defendant the proof of those facts necessarily within his knowledge, especially in cases affecting only property rights, and not involving a criminal charge or a forfeiture or penalty.

VI.

The appellant practically bases his appeal upon two propositions, which may be stated as follows:

1. It was necessary for the Government to prove that he had no claim made in good faith to the land.

2. The lands must be public lands.

Something has been said of the difficulty of proving a negative, and when it is necessary.

Waiving, for the purpose of argument only, all these technical questions, it is respectfully submitted that accepting the facts found as true, the Government did establish both of the above propositions.

It is found that the United States acquired title by the Gadsden purchase, and that the appellant had no claim beyond the Mexican grant, the papers concerning which were before the court and for its construction. Upon what seems, under the decisions of this court, satisfactory reasons, the court below held that the grant only gave title to four square leagues, and that the inclosed land was not within the grant. If that is the law, the appellant must be presumed to know it. If he knew it and still claimed beyond the true boundaries, such claim could not be in good faith.

This is but a reverse application of the long-settled rule upon the subject of intention. The courts are unable to probe the secret thoughts of man, and are compelled to adopt some standard by which his acts may be measured in adjusting his relations to his fellow men. Hence, even in criminal actions, where the averment must be that the defendant "willfully, maliciously," etc., did the act com-

plained of, all that is necessary is to show that the act is felonious. It is never necessary to show that the accused knew or thought what he was doing was a crime. *Ignorantia legis neminem excusat* is a familiar maxim, and is applied both in criminal jurisprudence and civil contracts.

In *Reynolds* vs. *United States* (98 U. S., 145) this court held that the belief of the accused that polygamy was a religious duty constituted no defense to an indictment for bigamy.

This class of cases could be indefinitely extended, but it is unnecessary to encumber a brief in this court with elaboration of this point.

No case could arise where it would be possible to apply any other satisfactory test to the act under discussion. In all cases the court would be unable to probe the mind of the claimant, and, by an examination of mental processes, determine whether or not he actually was foolish enough to believe that a grant of four square leagues meant sixteen square leagues. In this, as in the case of sale or purchase of real estate or bill of exchange in good faith, that is determined as a judicial question, however it may be in the field of ethics, by an examination of the facts surrounding the transactions and the acts done; and that condition of mind is imputed that the average experience has settled upon as accompanying such facts or inducing such acts.

So in this case imputing a knowledge of the law, which for purposes of administering human justice must enter into every act, it is respectfully submitted that the question of good faith or want of it depends upon the construction of the grant in question. Any other meaning given to the act would make its application depend en-

tirely upon the credulity of the claimant, and, as that increased, the domain which he might fence with impunity would be enlarged. Most people in speculating upon the probable fate of the weak-minded in the future state, or the different degrees of accountability dependent upon the different degrees of mental strength here, have doubtless felt that the Just Ruler of all would temper His judgments to the mentally shorn lamb, but I greatly doubt if any of us have ever felt that He would put such a premium on credulity as this court is asked to do by the appellant in this case.

The question of claim or color of title must necessarily be a question of law—it is readily conceded that the question whether it was *acquired* in good faith so far as that relates to the acquisition of the claim, *e. g.*, in this case the purchase of the interest of Romero by Cameron, is one of fact—as would be also the question whether the land fenced were within the four square leagues, which is not claimed. This has no relations to the question we have discussed, which is the proposition of appellant that a person under a deed conveying four square leagues may claim sixteen square leagues or thirty, as is asserted here (Mr. Barnes's brief, p. 3), and unless the United States can show that he makes this claim in bad faith, he may fence and use the public land to the full extent of his claim, even though successive Congresses refuse to recognize his claim and every department of the Government rejects it. If the deed described the entire tract claimed, but had been made by a person not the owner for the purpose of creating color of title, the question whether the

> One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, this negative is an essential element in his case." And in sec. 80: "So, where the negative allegation involves a charge of criminal neglect of duty whether official or otherwise, or fraud, or the wrongful violation of actual lawful possession of property, the party making the allegation must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged."

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1. It was necessary for the Government to prove that he had no claim made in good faith to the land.

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Something has been said of the difficulty of proving a negative, and when it is necessary.

Waiving, for the purpose of argument only, all these technical questions, it is respectfully submitted that accepting the facts found as true, the Government did establish both of the above propositions.

It is found that the United States acquired title by the Gadsden purchase, and that the appellant had no claim beyond the Mexican grant, the papers concerning which were before the court and for its construction. Upon what seems, under the decisions of this court, satisfactory reasons, the court below held that the grant only gave title to four square leagues, and that the inclosed land was not within the grant. If that is the law, the appellant must be presumed to know it. If he knew it and still claimed beyond the true boundaries, such claim could not be in good faith.

This is but a reverse application of the long-settled rule upon the subject of intention. The courts are unable to probe the secret thoughts of man, and are compelled to adopt some standard by which his acts may be measured in adjusting his relations to his fellow men. Hence, even in criminal actions, where the averment must be that the defendant "willfully, maliciously," etc., did the act com-

plained of, all that is necessary is to show that the act is felonious. It is never necessary to show that the accused knew or thought what he was doing was a crime. *Ignorantia legis neminem excusat* is a familiar maxim, and is applied both in criminal jurisprudence and civil contracts.

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So in this case imputing a knowledge of the law, which for purposes of administering human justice must enter into every act, it is respectfully submitted that the question of good faith or want of it depends upon the construction of the grant in question. Any other meaning given to the act would make its application depend en-

tirely upon the credulity of the claimant, and, as that increased, the domain which he might fence with impunity would be enlarged. Most people in speculating upon the probable fate of the weak-minded in the future state, or the different degrees of accountability dependent upon the different degrees of mental strength here, have doubtless felt that the Just Ruler of all would temper His judgments to the mentally shorn lamb, but I greatly doubt if any of us have ever felt that He would put such a premium on credulity as this court is asked to do by the appellant in this case.

The question of claim or color of title must necessarily be a question of law—it is readily conceded that the question whether it was *acquired* in good faith so far as that relates to the acquisition of the claim, *e. g.*, in this case the purchase of the interest of Romero by Cameron, is one of fact—as would be also the question whether the land fenced were within the four square leagues, which is not claimed. This has no relations to the question we have discussed, which is the proposition of appellant that a person under a deed conveying four square leagues may claim sixteen square leagues or thirty, as is asserted here (Mr. Barnes's brief, p. 3), and unless the United States can show that he makes this claim in bad faith, he may fence and use the public land to the full extent of his claim, even though successive Congresses refuse to recognize his claim and every department of the Government rejects it. If the deed described the entire tract claimed, but had been made by a person not the owner for the purpose of creating color of title, the question whether the

grantee had made or acquired his title in good faith would be a question of fact, *but when the dispute makes the grantee's good faith depend upon his belief as to the proper construction of the language of his grant*, it is submitted that there is no question of fact, for the reason stated. It is therefore submitted that the question of good faith in this case is dependent on the true construction of the grant in question, and is a question of law.

VII.

I am not competent to discuss the terms used in the original grant as mere questions of translation, not being familiar with the Spanish language.

I greatly doubt if the case turns on such refinements. I accept the translation found by the court below to be a correct one, and apply to the language there used the result of the greater learning of this court as exemplified in its decisions in similar cases. Fortunately I find that the words "*sitio de ganado mayor*" have been construed by this court. In *Fremont* vs. *The United States* (17 How., 542), a grant of ten "*sitios de ganado mayor*" was translated and considered by this court (p. 558) to mean ten square leagues and not ten leagues square, as is here contended.

In *United States* vs. *McLaughlin* (127 U. S. R., 428) it was assumed by the petitioner and the court (p. 434), and by a witness having more than thirty years' experience "in the surveyor-general's office in California in connection with the Spanish land grants making translations and

testifying in the courts" (p. 441), that the words "*once sitios de ganado mayor*" mean "eleven square leagues."

I have caused the records in the following cases decided by this court to be examined, and find that in each one of them the language used was *sitio de ganado mayor*, and that it has invariably been considered to mean square leagues and never leagues square. (*Hornsby* v. *United States*, 10 Wall., 224; *Malarin* v. *United States*, 1 Wall., 282; *United States* v. *Fossat*, 20 How., 413.)

It is respectfully submitted that there is no ground for the contention that a different meaning should be given these words at this late day.

The only remaining question is, Were these lands, outside of the grant of four square leagues, public lands? The appellant relies upon the case of *Newhall* vs. *Sanger*, (92 U. S., 761), as authority for answering this question in the negative. In behalf of the Government it is insisted that the authority referred to is not decisive nor, indeed, applicable to the case at bar, which in all its essential facts resembles the case of the *United States* vs. *McLaughlin* (127 U. S., 428). It is insisted that the answer to every contention of the appellant upon this branch of the case is found at pages 449 to 451 of that opinion. The lands were public lands, both in the sense that they were owned by the United States and were subject to entry under the authority referred to.

It was certain that the grant to the appellant must be located at the point San Rafael de la Zanja, and it is not to be supposed that an empire in extent was to be withdrawn from public settlement and improvement, because

of the unwarranted claim made by the appellant, a claim that has failed to receive the recognition of the political department of the Government, although, as this record shows, it has been urged upon the attention of that department, and of which failure this court, it is submitted, must take judicial notice, and hold that such failure is equivalent to a denial of the "claims" made.

Upon well-settled principles it is insisted that the settlers who have entered upon this land, founding homes and villages, and made improvements of great value, ought not to be dispossessed by a mere reference to a *diseño*, upon its face not purporting to be correct or accurate, and which was not followed by a grant pretending to conform thereto.

It is confidently submitted that the judgment below should be affirmed.

CHARLES H. ALDRICH,
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It is confidently submitted that the judgment below should be affirmed.

CHARLES H. ALDRICH,
Solicitor-General.

146 U.S. 533

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1892.

COLIN CAMERON,
Appellant,
vs.
THE UNITED STATES. } No. 42.

Appeal From the Supreme Court of Arizona Territory.

BRIEF OF APPELLANT IN REPLY.

ROCHESTER FORD,
Of Counsel for Appellant.

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BRIEF OF APPELLANT IN REPLY.

The brief for appellee seems to be directed chiefly to one point only, namely, to the point that the claim asserted by defendant herein is not valid or lawful. In support of this point counsel for appellee argues, first, that the claim of appellant if valid or lawful at all, is not valid or lawful to the extent claimed; and, second, that the claim is not valid or lawful to any extent whatever.

We briefly and respectfully submit that the validity or invalidity of defendant's claim is not to be determined in this action, and confidently rely on the case of Newhall v. Sanger, 92 U. S. 764, that the word "lawful" cannot be inserted into the act of February 25, 1885, to change its meaning. The position of defendant is that the whole of a certain tract of land as surveyed, measured and monumented was

sold in fee. The whole of this tract is his claim. Counsel for appellee argues as to the merits of this claim, and tries to show that only part of the tract was sold, if any was, and that the claim is valid at the utmost for only this smaller part. But will the merits of this claim be determined in this action? Is it not very manifest that as defendant had and has this actual subsisting and undetermined claim made in good faith, he does not come within the operation of the statute? Defendant asserts that the original title papers describe the land solicited and sold as *el terreno*, the land known, etc., as did the title papers in the case of Williams *et al.* v. United States, 92 U. S. 457, and that the true meaning of *sitio* as used in the *expediente* in this case is "place" and not league. But will these questions be inquired into and determined in this case? On the contrary, will not this court say, as did the court in U. S. v. Osborne, 44 Fed. Rep. 29, in construing this act of February 25, that as "the defendant had an actual claim made in good faith on his part, at the time of his entry thereon, the mere statement of these facts in the case ends it?"

The court will notice that the determination of the extent of the claim of defendant is wholly a question of law. He claims under an instrument, the boundaries of which are clearly defined on the earth's surface, and where this is the case the construction of the deed is a question of law only. How much was granted is to be determined by the title papers themselves. When the boundary lines of a grant are fixed by the grant itself, as in this case, the question as to what these lines are is purely one of law. (Magee v. Hallett, 22 Ala. 699; Burnett v. Thompson, 13 Ired. N. C. L. 379; Doe v. Paine, 4 Hawks, N. C. 64.)

Defendant was claiming and is claiming such a construction as would give him the entire tract. This was his claim, made and asserted in good faith, and undetermined when the fence was erected and this action brought.

But counsel for appellee goes further and devotes a large part of his brief in urging that the grant on which defendant's claim is based never had any validity under the laws of Mexico, and on page 17 of his brief speaks of other grants like this. Counsel is asking this court in the summary action instituted under the act of February 25, 1885, to go into the general subject of the grants to land in the territory acquired by the Gagsden purchase and to pronounce all such grants invalid. In all sincerity we do not think that this court will for one moment entertain such a view of this case. Congress has by act of March, 3, 1891, established a Court of Private Land Claims, before which court these questions can be properly adjudicated. We submit that they cannot be settled or even considered under the act of February 25, 1885.

Counsel for appellee makes the statement on page 8 of his brief that "in acquiring territory from a foreign state the sovereign acquires the fee * * * it is a transfer of political domain and of the proprietary interest in the land," and argues that therefore the fee of the lands claimed by defendant under his grant is in the United States, and that such lands must be "public lands." But to say that by a treaty the United States acquires lands which had theretofore been granted and had become the property of the inhabitants of the ceded territory, is contrary to the axiomatic and self-evident proposition that a treaty of cession can transfer nothing in which the granting

sovereign had no right of property. Lands he had previously granted were not his to cede. (Percheman's case, 7 Peters, 86; Dent v. Emmeger, 14 Wall. 108; Strother v. Lucas, 12 Peters, 412; Botiller v. Cominguez, 130 U. S. 238; Freemont v. U. S., 17 How. 542–553.)

To say that lands claimed under a Mexican grant are, while such claims is pending and unadjudicated, public lands of the United States, is directly opposed to the decision in Newhall v. Sanger and the long line of cases approving and following the principle therein announced.

The learned counsel for appellee speaks of the contention of appellant as an "extravagant claim," page 11 of appellee's brief; as an "absurd claim," page 13; of the "absurdity of the claim," page 14; "of this most exorbitant and extravagant claim," page 14. He asks "Does it not savor of black mail?" page 14, and calls defendant's position "a monstrous wrong," page 26. We regret that he should see fit to use such language, as it seems to be uncalled for. The defendant is respectfully urging upon this court certain questions of law arising from the record, believing that the findings of fact herein do not support the decree or conclusion of law appealed from. He is asking in good faith and propriety for an adjudication of this court which he believes will be in his favor, and we submit, with all deference, that nothing in the record warrants the language above quoted.

Respectfully submitted that this case should be reversed.

ROCHESTER FORD,

Of Counsel for Appellant.

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Respectfully submitted that this case should be reversed.

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Of Counsel for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 42.

COLIN CAMERON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

SUPPLEMENTAL BRIEF OF APPELLANT, IN REPLY TO BRIEF OF THE SOLICITOR-GENERAL FOR THE UNITED STATES.

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SUPPLEMENTAL BRIEF OF APPELLANT, IN REPLY TO BRIEF OF THE SOLICITOR-GENERAL FOR THE UNITED STATES.

The brief filed for the United States by the Solicitor-General invites the attention of this Court, as its first point, to the question whether there was such a trial of this cause below as raises any question for review in this Court. The contention of the Solicitor-General is that there was not, and this is based on the assumption that the District Court

of the First Judicial District of the Territory of Arizona was, as to the trial of this cause, "a common law court, exer- "cising as to this case, which is one arising under the laws "of the United States, the same powers as a district court "of the United States trying a common law case, and bound "to try it in accordance with the settled practice and pro- "cedure of such common law courts (page 8 of brief of Solici- "tor-General)." The conclusion is then urged that as the finding of issues of fact by the court upon the evidence is unknown to a common law court, and that as the findings of fact herein were made by the district court, and as a jury was not waived in the only manner provided by law, as it is supposed, namely, in writing, therefore "the act of the district "court in trying this case without the intervention of a "jury, and without a stipulation as to the facts, was not a "judicial act (page 17 of brief of Solicitor-General)."

Again, if the learned counsel had examined the Civil Practice Act of the Territory of Arizona in force at the time this case was tried, he would have seen that the authorities which he cites have no bearing of any kind on this case. The complaint herein was filed September 6, 1886, the trial began on April 18, 1887, and the findings of fact were made by the court on October 18, 1887 (Record, pp. 2, 6, 9). The Arizona statutes as to civil practice in force at the time of this trial are contained in the Compiled Laws of Arizona Territory, 1877. Paragraph 2437, section 1, page 409, provides that

In the first place, the assumption of the Solicitor-General that this is a *common law* action seems to be erroneous. *Common law* actions are actions such as at the time of the adoption of the Constitution were allowed by the practice

prevailing in England and the colonies for the assertion of *common law* rights, and by common law rights those must be understood which were common to all men.

There certainly never was, and is not now, any right which an owner of land might or may assert by an ordinary action against a trespasser on such lands without color of title for the removal of a fence or inclosure wrongfully erected thereon by such trespasser. The common law rights of such owner were by some possessory action to oust the intruder, or to recover damages against him in a suit for trespass.

The present action is one given to the United States alone as a civil remedy, and the nature of the civil remedy is special, anomalous, and more nearly resembling in form the remedial methods of a court of equity.

The "suits at common law" in which by the seventh amendment to the Constitution the right of trial by jury shall be preserved, have relation, it is submitted, to the common law as it was understood in England and to the right to such a trial in that class of cases. The remedy given the government by the act of February 25, 1885, is, as above stated, a summary remedy, a departure from the common law and at variance with it. We submit that this is not a "suit at common law."

"There shall be in this Territory but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs."

Paragraph 2475, section 39, page 414, provides that the complaint shall contain among other things,

"2d. A statement of the facts constituting the cause of action in ordinary and concise language."

Paragraphs 2617 and 2618, sections 181 and 182, page 436, under the sub-title of "Trial by the Court," are as follows:

"SEC. 181. Trial by jury may be waived by the several "parties to an issue of fact, in actions arising on contract; "and, with the assent of the court in other actions, in the "manner following:

"1st. By failing to appear at the trial.
"2d. By written consent, in person or by attorney, filed "with the clerk.
"3d. By oral consent in open court, entered in the min- "utes. The court may prescribe by rule what shall be "deemed a waiver in other cases.
"SEC. 182. Upon the trial of an issue of fact by the court, "its decision shall be given in writing, and filed with the "clerk within ten days after the trial took place. In giving "the decision, the facts found and the conclusions of law "shall be separately stated. Judgment upon the decision "shall be entered accordingly."

At the time the findings of fact herein were made the Revised Statutes of Arizona of 1887, which took effect July 1, 1887, were in force. Paragraph 757 (SEC. 109) page 177 of the Code of Civil Procedure provides

"On the first day of the term or on such day as may be "fixed by the court, the docket shall be called and if a jury "is demanded by either party such demand shall then be "made, and if not then made, the right to a trial by jury "shall be regarded as waived and the cause shall be tried "by the court unless the court by its own motion shall there- "after otherwise order. The party who demands a jury "shall then and there deposit with the clerk the amount of "*per diem* of such jury for one day, with and as a part of his "demand."

Paragraph 758 (SEC. 110), page 177 provides among other things that

"The rules hereinafter prescribed for the trial of causes

"before the jury shall govern in trials by the court as far as "applicable."

By the organic law of Arizona Territory (section 1851, Revised Statutes) "the legislative power of the Territory extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." Construing the powers of the Territorial legislatures under the above provision, which is part of their common organic law, this court has held, in Clinton *vs.* Englebrecht, 13 Wall., 434; Snow *vs.* U. S., 18 Wall., 317; Hornbuckle *vs.* Toombs, 18 Wall., 648; Reynolds *vs.* U. S., 98 U. S., 145, that—

"The practice, pleading and forms and the modes of procedure in the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the territorial assemblies and to the regulations which might be adopted by the courts themselves. * * * The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any State legislature; and the jurisdiction of the territorial courts is collectively coextensive with and correspondent to that of the State courts—a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the territories, like the State courts, are invested with plenary municipal jurisdiction."

Reynolds *vs.* U. S., 98 U. S., 145, is an instructive and decisive case as to the power of the territorial legislature. In that case an indictment was found in the District Court for the third judicial district of the territory of Utah charging defendant with bigamy, in violation of section 5352 of the Revised Statutes of the United States. This Court say, page 153:

"The indictment was found in the District Court of the third judicial district of the territory. The act of Congress "in relation to courts and judicial officers in the territory

of Utah," approved June 23, 1874 (18 Stat., 253), while regulating the qualifications of jurors in the territory, and prescribing the lists from which grand and petit jurors are to be drawn, as well as the manner of drawing, makes no provision in respect to the number of persons of which a grand jury shall consist. Section 808, Revised Statutes, requires that a grand jury empaneled before any district or circuit court of the United States shall consist of not less than sixteen nor more than twenty-three persons, while a statute of the territory limits the number in the district courts of the territory to fifteen. Comp. Laws Utah, 1876, 357. The grand jury which found this indictment consisted of only fifteen persons, and the question to be determined is whether the section of the Revised Statutes referred to or the statute of the territory governs the case.

"By section 1910 of the Revised Statutes the district courts of the territory have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States, but this does not make them circuit and district courts of the United States. We have often so decided (citing the cases). They are courts of the territories, invested for some purposes with the powers of the courts of the United States. Writs of error and appeals lie from them to the Supreme Court of the Territory and from that court as a territorial court to this in some cases.

"Section 808 was not designed to regulate the empaneling of grand juries in all courts where offenders against the laws of the United States could be tried, but only in the circuit and district courts. This leaves the territorial courts free to act in obedience to the requirements of the territorial laws in force for the time being (citing the cases). * * * We are, therefore, of the opinion that the court below no more erred in sustaining this indictment than it did at a former term, at the instance of this same plaintiff in error, in adjudging another bad which was found against him by a grand jury composed of twenty-three persons."

Under these decisions we submit that there can be no question of the power of the Arizona legislature to pass the statutes above quoted as to waiver of jury and trial by the court. Precisely similar statutes are found in the Codes of

Civil Practice of many of the Territories. (Compiled Laws of Utah, 1876, paragraphs 1404 and 1405, secs. 179 and 180, page 449; Idaho Code of Civil Procedure, sections 361, 389; Compiled Statutes of Montana, 1887, sec. 279.)

That the waiver of a jury and the findings of fact by the Arizona District Court herein are in conformity with the Arizona statutes is apparent from the records. That such entries comply with precisely similar statutes has been directly adjudicated. (Bruner *vs.* Marcum, 50 Mo., 405; Tower *vs.* Moore, 52 Mo., 118; King *vs.* Burdett, 12 West Va., 688.)

The cases of Stringfellow *vs.* Cain, 99 U. S., 610, and Benson Mining and Smelting Company *vs.* Alta Mining and Smelting Company, 145 U. S., 428, show that a jury was waived and the cases tried by the court under the same statute and the same facts as to the waiver of a jury as the case at bar. The second of these cases came up from the same Arizona district court, and in each case this Court passed on the merits of the appeal. In Stringfellow *vs.* Cain this Court say: "This case was heard in the territorial district court on the record certified up in accordance with these requirements, and in giving its decision the court stated its findings of fact and conclusions of law separately. In this it followed the rule prescribed by the civil practice act of Utah on the trial by the court of an issue of fact in a civil action," which civil practice act was, as above stated, identical with the Arizona statute on the same subject.

In the case of Idaho and Oregon Land Company *vs.* Bradbury, 132 U. S., 509, the learned Solicitor-General seems to assume that where this Court says on page 514 that the

"court is not authorized to try and determine the facts for itself, unless a jury is waived by the party according to the statute," sec. 649 of the Revised Statutes, providing for waiving a jury in a United States Circuit Court is meant; but a slight examination will show that sections 361 and 389 of the Idaho Code of Civil Procedure, cited on page 515 of the opinion, are referred to. They are precisely the same as the Arizona Statutes on the waiver of a jury.

The cases of Bond *vs.* Dustin, 112 U. S., 604, and the other cases cited on page 12 of the brief of the Solicitor-General all refer to Circuit or District Courts of the United States, and it seems clear that they have no bearing on the case at bar.

It seems perfectly clear that the jury in this case was waived, and the findings of fact made by the district court, in strict accordance with the Arizona statutes, and that this case is properly before this Court on appeal.

In the other briefs filed for appellant herein we have shown why, in our opinion, this case should be reversed and remanded with directions to the lower court to dismiss the bill of complaint.

ROCHESTER FORD,
Of Counsel for Appellant.

OF THE UNITED STATES.

OCTOBER TERM, 1892. No. 42.

COLIN CAMERON,

Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT

ON MOTION TO RE-INSTATE CAUSE.

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1893.

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ROCHESTER FORD,
Of Counsel for Appellant.

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1893.

Supreme Court of the United States.

October Term, 1889.

No. 365.

Colin Cameron,
Appellant,

vs.

The United States.

Brief for Appellant.

On Motion to Re-instate Cause.

Statement.

The appeal in this cause was dismissed.

The appellant now moves the Court to set aside the dismissal and re-instate the cause in order that the appeal may be considered and decided.

The action was brought to obtain the removal of a fence enclosing lands occupied by the appellant.

He denied the allegations of the complaint that the

land was public land of the United States, and that he had enclosed it without any title or color of title acquired in good faith, and set up his title to the lands. The value of the land exceeded five thousand dollars, but the Court held that not the land but color of title thereto was the matter in dispute, and that its value could not be or was not shown, and therefore dismissed the appeal.

The undersigned respectfully submits that the Court in dismissing the appeal has fallen into an error.

This error, the undersigned conceives, arises from a failure to correctly appreciate what the real "matter in dispute" was:

POINTS.

First.—In view of the circumstance that there was nothing which could be called argument of the question before the decision, the Court will, it is supposed, be the more ready to hear argument, even after the decision, unless the failure to fully argue the question was in some manner due to the appellant. Upon this point, in view of the circumstance of the large value of the land itself, the sweeping consequences of the judgment in the Court below, the finding of the Chief Justice in the Court below, in his allowance of the appeal respecting the value of the land, which was confidently taken by both parties as conclusive upon the point of jurisdiction, and the failure on the part of the United States to raise the question of jurisdiction either by motion to dismiss or by making the point in the briefs upon the final argument, neither the appellant nor his counsel can properly be chargeable with neglect should justice require another consideration by the Court of the point in question.

Second.—The matter in dispute was the right to possess, use and occupy the land inclosed by the fence, and this right, if not the same as title in this action, is not of less value than the land.

It is important, in the first place, to consider the purpose of the legislation under which the action was brought. The land in question was part of the territory acquired from Mexico by the purchase under the treaty of December 30, 1853, commonly called the Gadsden purchase. When land belonging to one nation is acquired by another by conquest, there may be, perhaps, a rigid right to confiscate all private property, and thus leave the conquering nation as the sole landowner. It is enough to say in reference to such action, that it would be in absolute violation of natural justice, and never in the slightest degree countenanced by the Government of the United States. Surely, it was no part of the purpose of the United States in making this purchase to turn every owner and occupant of land within the territory purchased out of doors. On the contrary, we know that the Government of the United States holds itself bound by the ordinary obligations of civilized communities, to respect in such cases private titles, and extend the same jealous protection as it extends to title acquired by its own citizens to its own territory. But we are not left to presumption upon this point. The Gadsden treaty expressly made applicable to the territory acquired under it certain provisions of the Treaty of Guadalupe Hidalgo; among them the ninth, which was as follows:

> "The Mexicans who, in the territory aforesaid,
> " shall not preserve the character of citizens of
> " the Mexican Republic conformably with what
> " is stipulated in the preceding article, shall be
> " incorporated into the Union of the United States,
> " and be admitted at the proper time (to be judged

"of by the Courts of the United States) to the "enjoyment of all the rights of citizens of the "United States according to the principles of the "Constitution; and in the meantime shall be "maintained and protected in the free enjoyment "of their liberty and property, and secured in "the free exercise of their rights, without restric-"tion."

In the case, however, of such acquisitions of property, the conquering or purchasing nation has the right to assure itself that titles to lands acquired from the sovereign government of another nation have been so acquired really and in good faith, and thus deserve the protection which the purchasing nation is willing to afford. In respect to the territory acquired under the Treaty of Guadalupe Hidalgo, for instance, Congress established a Board of Commissioners to examine into such titles, with power to confirm them, and required all titles to be presented to such Board for examination. No such provisions have been adopted by Congress in relation to the lands acquired under the Gadsden purchase, the only provision which has been made in respect thereto being that the Surveyor-General of Arizona may make a survey of grants of land in that territory, and report thereon to Congress. A certain amount of action in the way of making such surveys has been had; but it is believed that Congress has never acted upon any of it.

The condition of the appellant, therefore, in respect to the land in controversy, which is part of a much larger tract, is that he is a purchaser by certain mesne conveyances from Mexican grantees under a grant as old as the year 1825; and if there is no invalidity in that purchase (and it is confidently asserted that there is none, and the appellant is ready to maintain that asser-

tion whenever he may be called upon to make good his title), he has a perfect beneficial title, and he is in the same condition with each and every other proprietor of lands embraced by the territory acquired under the Gadsden Treaty.

The object of the statute referred to is plain upon its face. It was passed in view of the fact that there was a vast amount of wholly unauthorized *squatting* upon the property of the United States, without any claim or color of title. The purpose of the legislation was simply to repress that practice, and to repress it by the vigorous measure of treating those engaged in it as criminals, besides giving a civil remedy against them.

But at the time of the passage of the act there were immense tracts in the aggregate of the territory of the United States in the peaceful possession of persons who had not a final and unimpeachable title thereto, but who were still fully entitled to the possession and enjoyment; persons under the homestead, mining and other laws might be in the lawful enjoyment of property and have entirely just and valid claim to it without having a perfect title. And so also in respect to territories acquired, as by the Gadsden purchase, from Mexico. The whole of these titles were examinable, and, to a certain extent, impeachable, and could not be drawn out of that category until Congress, after such an examination as it chose to make, had ordered patents to be issued for them.

Surely, it was no part of the act in question to touch any of these parties in their possessions or in the full enjoyment of the property which they claimed. As already observed, the United States had, in the strongest possible manner, guaranteed to the occupants under these Mexican grants the fullest protection to their rights dur-

ing any interval which should elapse before the final examination of them.

The statute accordingly was made operative only where enclosures had been made upon lands of the United States by some person having "no claim or color of title "made or acquired in good faith, or an asserted right "thereto by or under a claim made in good faith with a "view to entry thereof at the proper land office under "the general land laws of the United States." This language is precisely applicable to the case of the appellant, and fully protects him in the occupation and enjoyment of his land.

But how has this statute been enforced? Although he is thus within the category designed to be protected, it is the direct, immediate and necessary effect of the judgment to determine that he is not one of the persons entitled to protection under the statute. That is to say, that he has no claim or color of title acquired in good faith. And inasmuch as this determination is between him and the United States, and necessarily puts him out of possession, and there is no means whatever by which he can recover that possession against the United States, he has absolutely lost his land.

Surely, in view of these considerations, the Court will not be inclined to interpret an affidavit designed to establish an appellate jurisdiction in this Court, with hostile scrutiny, but with the view of maintaining the right of appeal in those cases where every consideration of justice and equity require that it should be maintained. If the Supreme Court of the United States can not be reached by way of appeal in this class of cases, every owner and occupant of property embraced by the territory acquired under the Gadsden purchase is absolutely at the mercy of the Courts of the territory, and no matter how great the value of the property, even though it be millions in amount, he still cannot obtain

the review in this Court of a judgment which deprives him of it, because *color of title* is a sort of thing the value of which is not susceptible of pecuniary estimation.

The undersigned ventures to suggest to the Court that "the matter is dispute," reasonably interpreted, and without descending to metaphysical nicety, means the thing about which the parties to the controversy are in dispute. There may indeed be a distinction drawn between the dispute itself and the thing which is the subject of it. For instance, a suit may be brought to recover an installment upon a bond, and the defendant may dispute the validity of the bond. The matter in dispute, that is to say, the thing about which the parties are disputing, might, without inaccuracy, be said to be the validity of the bond. But the *subject* to which the dispute was limited would be the installment, to recover which the action was brought, and, if that were not sufficient to give this Court jurisdiction, any appeal to it must be dismissed.

What then was the matter in dispute in the present case? Certainly, it was not the *fence;* no one pretends that. It was the right to possess and occupy the lands enclosed by the fence. This right was claimed by the appellant. It was denied by the United States. If it existed, the United States must be defeated in the suit, and it was enough to defeat the suit if the appellant showed that he had a claim or color of title in good faith. The entire dispute, however, concerned the right of possession. In other words, it was like the question in any action of ejectment. The fate of such actions depends upon the right of possession. They do not necessarily involve questions of title, although they are the ordinary means by which questions of title are determined. And on that ground they are treated generally as determining questions of title,

and it has always been the practice of this Court to allow appeals in actions of ejectment where the value of the lands in controversy equals the requirements of jurisdiction.

Friend *vs.* Wise, 111 U. S., 797.
Wilson *vs.* Blair, 119 U. S., 387.
Glazier Mining Co. *vs.* Willis, 127 U. S., 471.

Let it be supposed that in an ordinary action of ejectment for lands exceeding $5,000 in value, the plaintiff has a judgment and the defendant appeals to this Court, would this Court entertain a motion by the respondent to dismiss his appeal based upon affidavits that the entire interest of the defendant in the lands did not amount to any title at all, and that all he had in respect to the lands was a mere possession with a claim of title. We imagine that such a motion would be denied at once upon the ground that the lands had, by the ejectment, been taken away from the defendant, and that if the value of the lands satisfied the requirements of jurisdiction, jurisdiction would be taken of the appeal or writ of error, and the Court would not, on the question whether it had jurisdiction or not, undertake to try the question of title, and see whether the claim advanced by the defendant was well founded. It would look to the fact simply that he had possession of the lands, claiming to be the owner of them, that the dispute turned upon the right to that possession, and that therefore the value of the lands must determine whether an appeal could be taken. The case might be otherwise if it appeared, or could appear, in such cases by the record that all the interest which the defendant claimed in the lands was that of a lessee at will, or for years, at such a rent that the value of his lease would not satisfy the requirements of jurisdiction.

Mr. Justice Brown, in his opinion, says :

> " It is not, however, the value of the property
> " in dispute in this case which is involved, but
> " the value of the color of title to this property,
> " which is hardly capable of pecuniary estimation ;
> " and if it were, there is no evidence of such value
> " in this case."

But what is the difference between *title* and *color of title* in such a case ? Either of them is simply the means by which a man vindicates and establishes his right to hold and enjoy property. If this vindication can be afforded by color of title as well as by title, then color of title is just as valuable as title itself. The " matter in dispute" was, in strictness, neither the title nor color of title. The suit was not one to have any title declared void or to compel the conveyance by one man to another of a title. It was simply a dispute about the right to possess lands, and the judgment appealed from has established, so that the defendant hereafter cannot dispute it as against the United States, that he has no right to the enjoyment of the lands in question in the same manner as a judgment in ejectment would have decided it.

Again, as already intimated, all that the appellant has, in a strictly legal point of view, and all that any owner of land within the limits of the Gadsden purchase has in his lands, is a claim of title acquired in good faith. And yet this claim of title is just as effective as the best and completest title in the world, as against all the world, in defending the possession and enjoyment of property. When, therefore, the value of a claim of title, coupled with possession, as is made here, is to be estimated, there should be no distinction made between claim of title and title itself. There is no real distinction. Either is sufficient to maintain in the defendant

the right to continue to occupy his lands, and neither is good for any other purpose.

But supposing a distinction were to be drawn between title and claim of title, or color of title, and an attempt be made to estimate the value of the claim or color of title, is it not easy to perceive that, even in that case, the requirements of jurisdiction are sufficiently met? This claim or color of title has assured the property in question to the appellant and his predecessors in title for nearly forty years under the Government of the United States. It is a perfect defense to his full occupation and enjoyment as an owner against all the world except possibly the United States, and even that exception is not to be made except upon the supposition that the United States will, in violatien of every moral right and its own express stipulations, refuse to confirm the appellant's title. There is no proceeding pending, or suggested, for turning the appellant out of his possession by action on the part of Congress, and not the slightest probability that he ever would have been disturbed, for his color of title under the provisions of the statute, under which this suit was brought, is a good defense to such suit. Is the value, under such circumstances of claim and color of title, anything less than the value of the lands? If it is what will secure, probably forever, to the appellant the enjoyment of his property, is not its value equivalent to the value of the property?

It is confidently submitted that in cases where the matter in dispute is the right to the possession—the indefinite and permanent possession and enjoyment of property, such indefinite and permanent enjoyment must be taken as equivalent to the property itself upon any question as to the value of the matter in dispute.

Third.—It is also confidently submitted that there is no authority establishing the proposition upon which the decision complained of was made. The learned Judge who pronounces it refers to none. The reason of the thing seems to the undersigned to be conclusive of itself, but the following cases seem to require a decision in favor of the right to appeal to this Court.

Sparrow *vs.* Strong, 3 Wall., 97.

In this case the action was in the nature of an ejectment to recover an interest in a mining claim in Nevada. The record contained an affidavit in the ordinary form "that the value of the property in dispute" exceeded two thousand dollars. A motion to dismiss was made on the ground, among others, that the interest in controversy was not capable of a money valuation, and therefore not of the value necessary to give jurisdiction. Nevada was formerly a part of upper California, and was acquired by the United States in 1848, by treaty, and the United States had made no grants of its public lands there.

In delivering the opinion of the Court, Chief Justice Chase said that the appeal should not be dismissed for the reason that the subject of controversy was not of jurisdictional value, and that "it is insisted that the "matter in dispute is a mining claim; that the land "where the mine exists has never been surveyed and "brought into market; and that, consequently, there "can be no mining right to such land in any per-"son capable of being estimated in money. * * * * *

"The territory, of which Nevada is part, was ac-"quired by treaty. Rights and titles, acquired under "ceding governments, remain unimpaired under our "government. We cannot know judicially, therefore, "that the right and title in controversy was not so ac-

" quired. If it was, it certainly may be capable of be-
" ing valued in money. * * * * *

" We know, also, that the territorial legislature has
" recognized by statute the validity and binding force
" of the rules, regulations and customs of the mining
" districts. And we cannot shut our eyes to the pub-
" lic history, which informs us that under this legisla-
" tion, and not only without interference by the national
" government, but under its implied sanction, vast min-
" ing interests have grown up employing many millions
" of capital and contributing largely to the prosperity
" and improvment of the whole country.

" We can not dismiss this writ of error, therefore,
" on the ground that a controversy concerning the pos-
" sessory right to a mining claim existing under the ex-
" press sanction of the territorial legislature and the
" implied sanction of the national government, does not
" relate to a subject-matter capable of being valued in
" money."

Glacier Mining Company *vs.* Willis, 127 U. S., 471.

In this case the action was brought to recover possession of a " tunnel, tunnel site and claim," and for one thousand dollars damages for withholding the same, and costs. The plaintiff alleged that the plaintiff's predecessors in title went upon the site of the claim when the same was unoccupied, and located the tunnel and marked the boundaries, and took other steps to obtain title, and that they and the plaintiff had been continuously in possession, had expended more than five thousand dollars, and had paid taxes on the property. The defendant demurred, and this writ of error was to review the judgment sustaining the demurrer. After argument, the Court dismissed the case for want of jurisdiction. The plaintiff in error then

moved to set aside the dismissal, and submitted affidavits showing the value of the property included in the claim. Permission was given for the submission of counter affidavits, but none were submitted, and the Court granted the motion to restore the cause to the docket in the position it occupied before it was dismissed. In the opinion on the merits, delivered by Mr. Justice Lamar, the Court said:

"With reference to the third ground of demurrer (that the complaint did not show any valid and subsisting pre-emption or location of the tunnel site) "it is "only necessary to say that the complaint alleges that "a valid and legal location of said tunnel was made by "persons under whom the plaintiff claims, and that the "plaintiff held possession of the same for more than "five consecutive years prior to the ouster by the de-"fendants, and paid all the taxes during that period "legally or otherwise assessed upon said property. "This, under the laws of Colorado, would give the "plaintiff a right to the premises in dispute "superior to any other claim, except that of the "government."

The plaintiff therefore had merely a right to the possession of the property, and the Court considered such right of the same value as the property, for the affidavits upon which the cause was reinstated were that the *property* exceeded the jurisdictional value.

The appellant in the case at bar claims the right to the possession of the land, and the record shows that the property exceeds five thousand dollars in value, and it is confidently asserted that on the authority of the cases last cited, this cause should be reinstated.

Fourth.—But if color of title, which is equivalent to the indefinite use and occupation of the land, for it guarantees such use and occupation, is the matter in dispute, the affidavits filed with this motion show conclusively that such indefinite use and occupation of the land exceeds the sum of five thousand dollars. These affidavits further show that the value of the land to the appellant depends upon his ability to maintain this fence. In other words, that with the fence the property exceeds the jurisdictional value; and without it, it is worthless, as the appellant would, if the fence were removed, be deprived of the use and occupation of the land enclosed. It is evident, therefore, that the right of the appellant to maintain the fence exceeds in value the jurisdictional amount.

Fifth.—It is also shown by the affidavit of the appellant that the *annual* value of the use and occupation of the enclosed tract is, and at all times since its enclosure has been, one thousand dollars and upwards. The removal of the fence would deprive the appellant of more than five years' occupation of the premises, and consequently color of title, by which he may prevent such removal, is worth more than five thousand dollars. In this aspect, the case is similar to United States *vs.* Addison, 22 How., 174, in which the matter in dispute was the right to the mayoralty of the city of Georgetown. The salary of the office was one thousand dollars per annum, payable monthly, and the term of office was two years. It was contended that the matter in dispute was a public office, not property, and the value thereof could not be ascertained. Mr. Justice McLean, in delivering the opinion of the Court, said, on the question of jurisdiction:

"In the Columbus Insurance Company *vs.* Wheel-
"wright, 7 Wheat., 534, it was held that a writ of error
"will lie from this Court upon the judgments of the
"Circuit Courts awarding a peremptory mandamus, if
"the matter in controversy is of sufficient value. But
"in that case it did appear that the office of di-
"rector of the insurance company, which was the mat-
"ter in controversy, was of less value than one thousand
"dollars, and that its value was to be ascertained by the
"salary paid; the Court held it had no jurisdiction.

"The weight of this authority is not lessened by the
"fact on which the question of jurisdiction turned.
"The salary of the Mayor of Georgetown was established
"by law at one thousand dollars per annum; and, if
"this be the matter of controversy, it settles the juris-
"diction."

He then answered the objection that a year's salary could not be regarded as the amount in controversy as it was payable monthly, and held that the Court had jurisdiction as "the matter in dispute" was "of the value of one thousand dollars"—the amount necessary to confer jurisdiction.

Last.—It is respectfully submitted that this motion should be granted, and the cause reinstated.

JAMES C. CARTER,
Of Counsel for Appellant.

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